

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

December 9, 2004 Session

LAWRENCE PARISI v. RYAN'S FAMILY STEAKHOUSE, ET AL.

Direct Appeal from the Circuit Court for Shelby County
No. CT-006631-03 Kay S. Robilio, Judge

No. W2004-01671-WC-R3-CV- Mailed March 14, 2005; Filed April 13, 2005

The employee, Lawrence Parisi, has appealed the trial court's dismissal of his workers' compensation lawsuit. Mr. Parisi was a Mississippi resident. He worked at a Ryan's Family Steakhouse in Mississippi and was injured there. Based upon the facts of this case and the applicable law, we affirm the dismissal entered by the trial court.

Tenn. Code Ann. § 50-6-225(e)(3) (Supp. 2003); Appeal as of Right; Judgment of the Circuit Court Affirmed

W. FRANK BROWN, III, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and MARTHA B. BRASFIELD, SP. J., joined.

Marvin A. Bienvenu, Jr., Memphis, Tennessee, for the Appellant, Lawrence Parisi.

Tanya L. Crosse, Knoxville, Tennessee, for the Appellees, Ryan's Family Steakhouse and Zurich American Insurance Company.

MEMORANDUM OPINION

I. Factual and Procedural Background

The employee, Lawrence Parisi ("Mr. Parisi"), lived in Mississippi near Memphis, Tennessee. Indeed, he was working in Memphis in 1997 at Wendy's when he was approached by a recruiter for Ryan's Family Steakhouse ("Ryan's"). Mr. Parisi met and talked with the recruiter in Memphis about the job opportunities and benefits of employment with Ryan's. The recruiter left the meeting and said he would get back with Mr. Parisi. Later, the recruiter in Memphis called Mr. Parisi at his home in Mississippi. The recruiter offered employment to Mr. Parisi and he accepted.

Mr. Parisi had to go to South Carolina for job training at Ryan's corporate headquarters. Mr. Parisi successfully completed the five-week training course and the drug screen. He was compensated by Ryan's during this five-week period. He was then made the manager of the

Ryan's Steakhouse in Horn Lake, Mississippi. Between his employment and December 9, 2002, Mr. Parisi worked two weeks at a Ryan's Steakhouse in Millington, Tennessee and one day in Bartlett, Tennessee. The other days, weeks, months and years were spent by Mr. Parisi at the Horn Lake, Mississippi location of Ryan's. At all times relevant to this lawsuit Mr. Parisi was a resident of Mississippi.

Mr. Parisi was injured on December 9, 2002 when he slipped and fell from a ladder while preparing the Horn Lake restaurant for the Christmas season. As a result of the injuries suffered by Mr. Parisi, Ryan's began paying him medical and disability benefits pursuant to Mississippi law. Mr. Parisi has filed this lawsuit in Shelby County, Tennessee because the workers' compensation benefits under Tennessee law permit a larger recovery than under Mississippi law.

After discovery and various amendments to the pleadings, the parties stipulated to the basic facts of the case. Counsel for Mr. Parisi filed a pre-trial Motion for Declaratory Judgment to determine the jurisdiction of the Shelby County Circuit Court over the case. The trial court, after reviewing the stipulation and hearing argument of counsel, determined that the claim should be heard in Mississippi and dismissed the case. Mr. Parisi appeals and contends that his contract for hire was made in Tennessee. Therefore, he contends that he has the choice to sue in Tennessee as well as Mississippi.

II. Standard of Review

Findings of fact are *de novo* upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Tenn. R. App. P., 13(d). In making this determination, we must give considerable deference to the trial judge's findings with regard to weight and credibility of any oral testimony. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). We weigh the evidence to determine where the preponderance lies and make an evaluation of the judgment within the confines of established rules.

III. Analysis

The legal analysis of this case begins with two statutes which purportedly give Tennessee courts jurisdiction over Mr. Parisi's claim. First, Tenn. Code Ann. section 50-6-115 provides:

50-6-115. **Extraterritorial application of chapter.** - If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or, in the event of the employee's death, the employee's dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, the employee, or in the event of the employee's death resulting from such injury, the employee's dependents, shall be entitled to the benefits provided by this chapter; provided, that at the time of such injury:

(1) The employment was principally localized within this state; or

(2) The contract of hire was made in this state.

Second, Mr. Parisi also relies on the last sentence of Tenn. Code Ann. section 50-6-225(a), (Supp. 2003), which provides as follows:

50-6-225. Submission of claim to court upon failure to agree on compensation - Special workers' compensation appeals panel - Impasse - (a)(1) In case of a dispute over or failure to agree upon compensation under the Workers' Compensation Law between the employer and employee or the dependents of the employee, either party may file a civil action in the circuit, criminal, or chancery court in the county in which the employee resides or in which the alleged injury occurred. In instances where the employee resides outside the state of Tennessee and where the injury occurs outside the state of Tennessee, then the complaint shall be filed in any county where the employer maintains an office.

The second statute does not help Mr. Parisi in this case. Tenn. Code Ann. section 50-6-225(a)(1) (Supp. 2003) is a venue statute, not a jurisdiction statute. Subsection (a)(1) provides the place of filing the claim for workers' compensation benefits. Tennessee residents who receive injuries in Tennessee have a choice of two places to file their lawsuit: in the county where the injury occurred or in the county in which the employee lives. However, if the injured employee is injured outside the boundaries of Tennessee, then that person, if the other conditions of Tenn. Code Ann. section 50-6-115 are met, must file the lawsuit in a county in Tennessee which has an office of the employer. This last sentence of section 50-6-225(a)(1) must be read in conjunction with Tenn. Code Ann. section 50-6-115, the jurisdictional statute. Thus, if Tennessee has jurisdiction, pursuant to Tenn. Code Ann. section 50-6-115, over an employee's claim, where the injury occurred outside Tennessee, then the place of filing the action is in any county where the employer has an office.

Thus, to determine this case, the court must examine Tenn. Code Ann. section 50-6-115. Counsel for Mr. Parisi does not contend that his client's "employment principally was localized" in Tennessee. However, he does contend that the "contract of hire" occurred in Tennessee. The Agreed Statement of Facts, upon which the trial court decided this case, stated:

An interview was arranged in Germantown, Tennessee, where he [Mr. Parisi] was interviewed by a [Ryan's] company representative. He was later contacted from Shelby County by that company representative at his home in Mississippi, and was offered employment which he accepted.

In addition to reviewing the Agreed Statement of Facts, the trial court also heard the arguments of counsel. First, the following is quoted from the transcript of the hearing on May 7, 2004, before the trial court:

[Plaintiff's counsel] [M]r. Parisi was at his home in Southaven, Mississippi. He accepted the call, and they said, Do you want to come to work for us? And he said, Yes. [p.3]

Later, the following was argued:

[Defendants' counsel] He did not sign a contract in Shelby County, but he accepted employment in Mississippi. And the case law is clear that the terminating point at where a contract for hire is made is where the acceptor accepts employment. And Mr. Parisi, according to the undisputed facts and his testimony, was at his home in Mississippi when he accepted the employment offer made by the Ryan's representative. [p. 7].

Later, after hearing the arguments and position of the defendants' attorney, the trial court allowed Plaintiff's counsel, the movant, to close the argument. The following occurred:

[Plaintiff's counsel]. Now, there is an interesting question, and I couldn't resolve this myself. I remember some contract law in law school, it was about the mailbox doctrine and stuff like this. This is a situation where he interviewed in Shelby County, the guy said, I'll call you, basically, and let you know. He called him a day or two later and said, We want you to come work for us; will you accept employment. And Mr. Parisi said, Yes.

THE COURT: He was in Mississippi at the time that he accepted?

MR. BIENVENU: [Plaintiff's counsel]: The call originated from Shelby County, and he was at his home in Mississippi when he accepted. I think that gives dual jurisdiction at the very least for either state to maintain this cause of action. [p. 10].

The trial judge was most correct in dismissing the case because the place of acceptance constitutes the place of the contract. Under those facts, the contract of employment was accepted in Mississippi. *See Matthews v. St. Paul Prop. & Liability Ins.*, 845 S.W.2d 737, 739 (Tenn. 1992), where the Supreme Court held that Tennessee courts had jurisdiction to hear a case where a Tennessee resident accepted the offer of employment while at home in Tennessee.

However, on appeal, counsel for Mr. Parisi became quite inventive and attempted to use contract principles to change the facts. On appeal it is contended that Mr. Parisi did not accept

the offer in Mississippi but instead made a counteroffer, such as he would desire to work for Ryan's but he would have to give two weeks notice to his present employer before he could accept the employment with Ryan's. This counteroffer was then accepted by the Ryan's representative in Memphis. Presto: the Mississippi contract has become a Tennessee contract. *See also Tolley v. General Accident, Fire & Life Ins. Corp., Ltd.*, 584 S.W. 2d 647, 648-49. (Tenn. 1979).

The trial court was not presented with any proof or argument about a counteroffer. Indeed, the transcript of the record before the trial court was clear, as shown above. The court feels strongly that it is impermissible to "change the facts" of the case during the appeal for a number of reasons. First, the appellant is estopped from taking a different position on appeal than he took at the trial court. Second, one waives issues, positions, etc. that are presented on appeal for the first time and are not presented to the trial court. Tenn. R. App. P. 13(c). Third, even if we apply contract principles, the result would be the same. One, *Restatement (Second) of Contracts* §59 provides that Mr. Parisi's request for a two-week notice to his employer was implied in the offer and thus is not a true counteroffer. Prior to making the offer, the recruiter had been told by Mr. Parisi that he would have to give a two week notice before leaving Wendy's. Two, one could argue that the "real" employment contract did not exist until after Mr. Parisi completed the five-week training course and successfully passed the drug screening test. Thus, one would argue that the "real" employment contract was made in South Carolina or that the "real" employment contract came into being when Mr. Parisi appeared for work in Mississippi. Three, this may be a case of an employee accepting employment in Mississippi and the contract was subject to a condition subsequent: complete the training and pass the drug screen.¹

During oral argument, counsel for Ryan's requested damages for a frivolous appeal. We decline to consider this request for damages for a frivolous appeal made for the first time during oral argument.

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A number of unreported cases have followed the rule of non-coverage or no jurisdiction in these type cases. In *Crisp v. Liberty Mut. Ins. Co.*, M2002-01236-WC-R3-CV, 2003 Tenn. LEXIS 341 (Tenn. Workers' Comp. Panel May 2, 2003), the employee lost her case by summary judgment. She was hired in Missouri by a Minnesota company and was injured in Colorado. The Tennessee case was dismissed. The dismissal was affirmed by the Supreme Court Workers' Compensation Appeals Panel. In *Parish v. Massman Constr. Co.*, W2001- 678-SC-WCM-CV, 2002 Tenn. LEXIS 355 (Tenn. Workers' Comp. Panel August 1, 2002), a Tennessee resident applied for employment in Arkansas. He was hired after his union in Tennessee cleared the employment. He was injured in Arkansas, where he performed all of his work. His case filed in Tennessee was dismissed. The dismissal was affirmed on appeal by the Supreme Court Workers' Compensation Appeals Panel. In *Herron v. Hornady Truck Lines, Inc.*, No. 03601-9807-CH-00072, 1999 Tenn. LEXIS 172 (Tenn. Workers' Comp. Panel March 18, 1999), Mr. Herron was found to have been employed in Alabama and injured in Alabama. His Tennessee case was dismissed by summary judgment and affirmed on appeal by the Supreme Court Workers' Compensation Appeals Panel.

IV. Conclusion

Mr. Parisi, the employee, lived in Mississippi, worked in Mississippi, and was injured in Mississippi. Mr. Parisi's contract of hire occurred in Mississippi, not Tennessee. Therefore, he must continue to pursue his claim in Mississippi under Mississippi law. The costs of this appeal are taxed to the appellant, Lawrence Parisi, and his surety, for which execution may issue, if necessary.

W. FRANK BROWN, III
SPECIAL JUDGE

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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 fact 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, Lawrence Parisi, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM