314 P.3d 900 (Table)
Unpublished Disposition
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Court of Appeals of Kansas.

John and Sandra WEST and
Tina Renee Tyre, Appellees,
v.
Dan MILLER, Defendant,
and
Francisco G. Hernandez, Appellant.

No. 109,103.
|
Dec. 13, 2013.

Appeal from Wyandotte District Court; David W. Boal, judge.

Attorneys and Law Firms

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J. Kent Emison and Jessica M. Agnelly, of Langdon & Emison, of Lexington, Missouri, and Donald T. Taylor, of Robb, Taylor & O'Connor, of Kansas City, for appellees.

Before GREEN, P.J., PIERRON, J., and KNUDSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Defendant, Francisco G. Hernandez, appeals an order of the trial court granting plaintiffs' motion for a voluntary dismissal, without prejudice, of their wrongful death action against the defendant. Hernandez argues that the trial court abused its discretion in granting the dismissal because of the plain legal prejudice he will suffer as a result of plaintiffs' later decision to refile their lawsuit in Missouri. Because we lack jurisdiction, we dismiss.

This case began as a personal injury lawsuit based on the alleged negligence of two defendants in a Kansas car accident.

The lawsuit voluntarily dismissed by plaintiffs without prejudice stemmed from a car accident that occurred on December 18, 2009, on I–70 in Wyandotte County, Kansas.

Plaintiffs John and Sandra West (the Wests) first filed a personal injury lawsuit on September 21, 2010, as the guardians of their son, Desmond West. They alleged Desmond suffered incapacitating injuries after his car collided with the rear end of a car driven by Dan Miller, Jr., when Miller's car suddenly and unexpectedly slowed in the far left lane of highway traffic because of emergency vehicles in the area. After striking Miller's car, Desmond's car spun into the next lane of traffic, where it was struck on the driver's side by a car driven by Hernandez. The Wests alleged that the negligence of both Miller and Hernandez caused Desmond's injuries.

The case became a wrongful death action after the plaintiffs' ward died from the injuries he sustained in the car accident.

After Desmond died from his injuries on May 30, 2011, the court granted the Wests leave to file a first amended petition on December 16, 2011. In that petition, they raised a wrongful death claim against Miller and Hernandez and added Tina Renee Tyre as a plaintiff acting for and on behalf of Dasha West, her young daughter with Desmond. Hernandez consistently denied any liability, generally answering that it was Desmond's or Miller's fault in causing the damages sought by plaintiffs. Miller, likewise, shifted the blame to Desmond or Hernandez.

In July 2012, Hernandez moved for summary judgment, arguing that he lacked any capability to avoid the collision. Plaintiffs and Miller both opposed Hernandez' motion. The trial court denied that motion following a hearing on September 24, 2012, due to remaining questions of fact.

More than 2 years after the case was filed, the trial court granted plaintiffs' motion for a voluntary dismissal without prejudice.

On the same day the court denied summary judgment, plaintiffs moved to dismiss without prejudice under K.S.A.2012 Supp. 60–241(a)(2), which is the underlying subject matter of this appeal. It was filed less than 2 weeks before the scheduled pretrial conference and just over a month before the November 5 trial date.

Hernandez objected that he would be legally prejudiced if the court granted plaintiffs' motion to dismiss because plaintiffs admittedly planned to refile their lawsuit in Missouri, where Hernandez has apparently always resided and Dasha now resides, having moved there sometime in early to mid 2012. Specifically, Hernandez focused upon two areas in which he would allegedly suffer legal prejudice if the court granted plaintiffs' motion. First, he complained that he would lose the benefit of Kansas' cap on noneconomic damages (K.S.A.60–19a02), which either did not exist or had recently been declared unconstitutional under Missouri law. Second, Hernandez argued that if the case was refiled in Missouri and the Missouri court applied Missouri substantive law, which was likely, he would lose the benefit of Kansas' more strict comparative fault rules, upon which he had centered his defense and expert witness preparation. Alternatively, Hernandez asked that if the court granted dismissal, it impose the condition that plaintiffs could only refile the litigation in Wyandotte County District Court.

***2** After receiving additional briefing from the parties and conducting a nonevidentiary hearing, the trial court entered an order of dismissal without prejudice. In support, the trial court held that Hernandez' prejudice claim "is primarily that the case *may well* be refiled where there are no caps on non-economic damages." (Emphasis added.) The trial judge noted that he had been informed that Missouri has never had a cap on noneconomic damages in cases other than medical malpractice. Thus, it found that plaintiffs "do not seek to file in Missouri to take advantage of any change in the law which would prejudice Defendants." The court further explained that "[s]ince the Plaintiffs could have filed in Missouri initially and there then would have been no non-economic caps, the Court believes Defendant Hernandez does not make a compelling case that he's prejudiced." In conclusion, the court held:

> "Should the case be refiled in Kansas, all discovery, witness and exhibit disclosures, expert disclosures and other matters transacted in this case will apply to the refiled case and nothing additional will be permitted absent leave of court. Should this matter be refiled in Missouri this Court has no authority to control the progress of that case but would recommend that the Court to which the case is assigned consider the entry of similar orders."

Plaintiffs have refiled the wrongful death lawsuit in Missouri.

The record reveals that plaintiffs did, indeed, refile their wrongful death lawsuit in Missouri a week after the Kansas trial court granted their motion to dismiss. In response, Hernandez pointed this pending appeal out to the Missouri trial court, raised several defenses, and sought either a dismissal or, at the very least, application of Kansas law to the lawsuit.

The record on appeal indicates that the Missouri litigation case remains ongoing. The two most recent decisions by the Missouri trial court that appear in the record, both of which favor plaintiffs, were entered in May 2013. One order declared that Missouri law would govern with respect to comparative fault, statutory caps on noneconomic damages, and all other substantive issues regarding recovery. The other order denied Hernandez' motion to dismiss or stay the Missouri proceedings based on the doctrine of comity.

Importantly, in support of its denial of a dismissal or stay, the Missouri trial court rejected Hernandez' argument that he would be prejudiced because he had developed his legal strategies and retained experts with Kansas' comparative fault laws in mind. The Missouri trial court reasoned that it "has other means of dealing with this potential prejudice. For example, the Court may authorize Defendant Hernandez to endorse new experts and consider a motion in limine to prevent plaintiff from referring or calling Defendant Hernandez' previously disclosed expert(s)." In denying a stay, the Missouri trial court rejected plaintiffs' and Miller's position that Hernandez' appeal in this case was frivolous. It did, however, find "the arguments pursued by Defendant Hernandez in the Kansas appellate courts unpersuasive, especially in light of the methods suggested by this Court

in this Order to address the claimed prejudice from the dismissal." The court also expressed concerns that, in light of Miller's age ("over the age of 80"), he might not be able to participate if the matter was stayed until this appeal was decided. Nevertheless, the Missouri trial court expressed that it "remains concerned, however slightly, that the parallel litigation could result in two separate but different judgments." It found those concerns could be allayed, however, by case management and continued trial settings, as long as the parties kept the trial court apprised of the status of this appeal.

Does this court have jurisdiction over this appeal?

*3 Before addressing Hernandez' substantive challenge to the trial court's order granting plaintiffs' motion for a voluntary dismissal, we must first consider whether we have jurisdiction to consider this appeal in the first place. Hernandez argues we do. Plaintiffs argue we do not. Miller has not filed a brief.

When this appeal was initially docketed in our court, this court ordered the parties to show cause why the appeal should not be dismissed for lack of jurisdiction because the order appealed from was not considered a final order under Kansas law. See *In re T.S. W.*, 294 Kan. 423, 432, 276 P.3d 133 (2012) (noting appellate court has duty to question jurisdiction on its own initiative and must dismiss when record discloses lack of jurisdiction over appeal). After receiving the plaintiffs' and Hernandez' extensive responses, this court retained the appeal and asked the parties to brief the issue of jurisdiction.

Plaintiffs suggest Hernandez' failure to include his argument on the jurisdiction issue in his brief amounted to a waiver of "any argument on this topic." Hernandez replies that he intended to stand on his prior briefing of the issue, not to waive it. The better practice might have been for Hernandez to briefly state this intention to stand on prior arguments in his brief to satisfy this court's order to brief the issue. Nevertheless, we determine that Hernandez has not waived his argument that this court has jurisdiction to consider his appeal from the trial court's order granting plaintiffs' motion for a voluntary dismissal, without prejudice, of their lawsuit.

Turning to the merits, we note that whether this court has jurisdiction to consider an appeal is a legal question subject to unlimited appellate review. *Frazier v. Goudschaal*, 296 Kan. 730, 743, 295 P.3d 542 (2013).

Notably, there is neither a vested nor a constitutional right to appeal, so this court's jurisdiction is legislatively defined by statute. See *Harsch v. Miller*, 288 Kan. 280, 287, 200 P.3d 467 (2009). Hernandez argues that this court has jurisdiction under K.S .A.2012 Supp. 60–2102(a)(4), which grants this court jurisdiction over "[a] final decision in any action, except in an action where a direct appeal to the supreme court is required by law." Alternatively, he urges this court to consider the appeal under the collateral order doctrine.

Our courts have already held orders of voluntary dismissal without prejudice are not considered "final" decisions under K.S.A.2012 Supp. 60–2102(a)(4).

As this court pointed out in its show cause order, our Supreme Court has held that an order granting a voluntary dismissal without prejudice is not considered a "final decision" under K.S.A.2012 Supp. 60–2102(a)(4). See *Bain v. Artzer*, 271 Kan. 578, 580–81, 25 P.3d 136 (2001) (discussing and quoting *Brower v. Bartal*, 268 Kan. 43, 990 P.2d 1235 [1999], and citing *Hodge v. Hodge*, 190 Kan. 492, 492–93, 376 P.2d 822 [1962]; *Scott v. Craft*, 145 Kan. 172, 173, 64 P.2d 10 [1937]; *Beverly Enter.-Ark., Inc. v. Hillier*, 341 Ark. 1, 3–4, 14 S.W.3d 487 [2000]; *Watson v. Pepper*, 738 So.2d 512 [Fla. Dist.App.1999]; *Int'l Insurance Co. v. Morton Thiokol, Inc.*, 185 Ill.App.3d 686, 691, 542 N.E.2d 6 [1989]; and *BACA v. Atchison, Topeka & Santa Fe Ry.*, 121 N.M. 734, 735, 918 P.2d 13 [Ct.App.1996]). These decisions are grounded on the fact that a "final decision" has been defined as "one which finally disposes of the entire merits of the case and leaves no further questions or directions for future actions by the court. *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 29, 59 P.3d 1003 (2002)." *Ramsey v. Lee Builders, Inc.*, 32 Kan.App.2d 1147, 1152, 95 P.3d 1033, *rev. denied* 278 Kan. 847 (2004).

The authorities relied upon by Hernandez to show that the order in this case is legally or factually distinguishable are inapposite.

*4 Hernandez seeks to factually distinguish the order in his case on the basis that the anticipated future litigation that rendered those decisions nonfinal would impliedly take place within the same jurisdiction, *i.e.*, Kansas; whereas the facts of his case showed a high likelihood the case would be refiled in Missouri, which proved to be a reality shortly after the dismissal. He argues that

the "unique circumstances" of his case demonstrate that the proceedings have definitively concluded *in Kansas* and that, without declaring it a final decision, the order of dismissal will never be reviewable in any other proceeding. In other words, Hernandez argues that the order of voluntary dismissal without prejudice is final because it finally disposes of the entire merits of the case and leaves no further questions or directions for future actions in *a Kansas* court.

As support for his final-decision argument, Hernandez relies primarily upon decisions from other jurisdictions that have held orders that granted dismissal based upon forum selection clauses in contracts are, for all practical purposes, final and appealable orders. See, *e.g., Triple Quest, Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 381–82 (N.D.2001); *Overhead, Inc. v. Standen Contracting*, No. L–01–1397, 2002 WL 398342 (Ohio App.2002) (unpublished opinion). Those cases are distinguishable, however, on several grounds.

First, both *Triple Quest* and *Overhead, Inc.*, involved appeals from orders enforcing forum selection clauses, through which the parties contract to subject any arising disputes to one particular forum or venue. Here, on the other hand, it is apparently undisputed that negligence cases such as that now before this court could properly be brought in either Kansas or Missouri.

Second, it seems to be a foregone conclusion in both the North Dakota and Ohio cases cited by Hernandez that no further litigation would occur in the state where the challenged order was issued. See *Triple Quest*, 627 N.W.2d at 381–82 (citing *Autoridad de Energia Electrica de PR v. Ericsson*, 201 F.3d 15, 17–18 [1st Cir.2000]; *Florida Polk County v. Prison Health Service*, 170 F.3d 1081, 1083 [11th Cir.1999]; *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1345 [10th Cir.1992]; *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 277–78 [9th Cir.1984]; and *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592, 595 [Mo.App.2000], which all held dismissal of actions to enforce forum selection clauses directing litigation be conducted in another jurisdiction are appealable orders, even though not on the merits and without prejudice, because a trial court's dismissal without prejudice has the practical effect of terminating the litigation in the plaintiffs' chosen forum and is therefore final in the sense that it terminates the controversy in either the state or federal court in which the action was brought). Here, on the other hand, without the benefit of hindsight, this court cannot say that there is *no* chance that plaintiffs will refile their lawsuit in Kansas.

***5** Third, and perhaps most important, the *Overhead, Inc.*, and *Triple Quest* decisions relied upon by Hernandez are based on differing statutory language governing the appellate jurisdiction of those courts. Those jurisdictions' legislatures have qualified certain orders as appealable orders under certain circumstances that the Kansas Legislature has not. For example, in *Overhead, Inc.*, the Ohio appellate court held that an order enforcing forum a selection clause is a "provisional remedy" subject to appeal under Ohio Rev.Code Ann. § 2505.02(B)(4) (Anderson 2001), which provides:

> " 'An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> [....]
>
> " '(4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> " '(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> " '(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.' " *Overhead, Inc.*, 2002 WL 398342, at *2–3.

Likewise, the decision in *Triple Quest* is grounded upon North Dakota's statute that provides parties can appeal to the North Dakota Supreme Court from "[a]n order affecting a substantial right made in any action, when such order *in effect* determines the action and prevents a judgment from which an appeal might be taken." (Emphasis added.) N.D. Cent.Code § 28–27–02 (2006). In holding it had jurisdiction to review the order enforcing the forum selection clause, the North Dakota Supreme Court reasoned:

> "The trial court's order has the practical effect of determin[ing] the action' under N.D. [Cent.Code] § 28–27–02(1), because it terminates the action in North Dakota by *permanently* putting the parties out of any

North Dakota district court. See generally N.D. Const, art. VI, §§ 1 and 8 (referring to a single district court' under the unified judicial system). Interpretation of the forum selection clause is an issue completely separate from the merits of Triple Quest's claims for breach of contract. The order dismissing the action without prejudice to be refiled only in Ohio also 'prevents a judgment from which an appeal might be taken' under N.D. [Cent.Code] § 28–27–02(1), because there is no action remaining in this state, *the same action could not be brought in this state,* and the trial court's decision would be res judicata in an Ohio court. See generally *Minex Resources, Inc. v. Morland,* 518 N.W.2d 682, 687 (N.D.1994) (holding res judicata prohibits relitigation of claims raised in prior action between same parties or their privies which were resolved by final judgment in a court of competent jurisdiction)." (Emphasis added.) 627 N.W.2d at 382.

***6** As further support for his position that this court should similarly rule the order in this case is, for all practical purposes, "final," Hernandez points out that our legislature previously defined a " 'final order' as 'an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment.' G.S.1949, 60–3303." *Brower,* 268 Kan. at 45. But this language is no longer used to define appellate jurisdiction in Kansas. Even if it were, an order dismissing a case without prejudice would still not qualify as a "final order" because it would not "determine the action," nor would it effectively "prevent a judgment." In short, we decline Hernandez' invitation to read into the statutory language to define a final judgment as one that "determines the action *in Kansas* and prevents a judgment *in Kansas.*" That is not how our legislature has defined this court's jurisdiction.

Hernandez further argues that "[t]his Court has recognized that under certain circumstances orders of dismissal that are issued 'without prejudice' are 'final decisions' for appellate purposes." In support, he cites to this court's holding that "[w]here a case has been involuntarily dismissed without prejudice, there will be appellate jurisdiction of such dismissal only where the plaintiff contends that he or she will suffer some real prejudice from the dismissal." *Cohen v. Battaglia,* 41 Kan.App.2d 386, Syl. ¶ 2, 202 P.3d 87 (2009), *rev'd on other grounds* 296 Kan. 542 (2013). Even if this holding in *Cohen* is still considered good law in light of our Supreme Court's reversal handed down just a week before Hernandez responded to this court's show cause order in this case, it is wholly inapposite. Prejudice to *a plaintiff* stemming from an *involuntary* dismissal is inapposite from a defendant's challenge to an order granting plaintiffs' motion for a voluntary dismissal.

Hernandez' last effort at demonstrating the finality of the trial court's order of dismissal for purposes of appellate jurisdiction is likewise unavailing. He complains that the decision granting plaintiffs' voluntary dismissal must be deemed final because, otherwise, he will not have any means to challenge the Kansas trial court's denial of his motion for summary judgment. According to Hernandez, "[t]o hold otherwise would allow ... plaintiff[s] to test the law of one state and, receiving a determination which reveals they may have legal advantage in another state, voluntarily dismiss without prejudice their original litigation, to take advantage of the more favorable law elsewhere."

We disagree with this argument for at least two reasons. First, Hernandez' argument overlooks the trial court's specific finding that plaintiffs were not seeking to inappropriately gain some sort of legal advantage by voluntarily dismissing their lawsuit. Second, a judgment denying summary judgment is by its very nature interlocutory and subject to reconsideration until a case is finally decided, whether by a Kansas trial court or a Missouri trial court. In other words, Hernandez is not, as he seems to suggest, legally stuck with the trial court's first ruling on his summary judgment motion.

***7** In summary, our legislature has not decided to define a "final decision" for purposes of appellate jurisdiction under K.S.A.2012 Supp. 60–2102(a)(4). As noted in the earlier-cited cases, however, our Supreme Court and this court have defined it and consistently conclude when faced with this jurisdictional question that a voluntary dismissal without prejudice is not a "final decision." This court is duty bound to follow Kansas Supreme Court precedent. *Anderson Office Supply v. Advanced Medical Assocs.,* 47 Kan.App.2d 140, 161, 273 P.3d 786 (2012) (noting Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication court is departing from its previous position). *Where* the litigation can *possibly* be refiled is technically of no consequence to the nonfinality of the decision. Hernandez' arguments seem better suited in the legislature.

The collateral order doctrine does not apply here.
Alternatively, Hernandez argues that even if the order appealed from is not final, this court should apply the collateral order doctrine to exercise jurisdiction over his appeal. Plaintiffs have not responded to this argument.

The collateral order doctrine in Kansas essentially mirrors the legislative enactments upon which the North Dakota and Ohio decisions discussed above are grounded. Our Supreme Court has explained:

> "[The collateral order] doctrine, which [our appellate courts] sparingly apply, provides a narrow exception to the final order requirement. It 'allows appellate courts to reach "not only judgments that 'terminate an action,' but also a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.' [Citation omitted.]' " [Citations omitted.]
>
> "As the doctrine is applied in Kansas, an order may be collaterally appealable if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. [Citation omitted.]" *In re T.S.W.*, 294 Kan. at 434.

Hernandez insists each of these requirements for applying the collateral order doctrine were met under the facts of this case.

First, Hernandez argues that the disputed question he seeks to appeal—which he identifies as whether the order granting plainitffs' voluntary dismissal "resul[ted] in 'plain legal prejudice' when the litigation was later refiled under Missouri law"—was conclusively determined by the trial court's order. Although the trial court's order on appeal did reject Hernandez' argument of legal prejudice based on his claim that plaintiffs were improperly seeking to take advantage of a change in the law on no caps on noneconomic damages, it did not address his other allegations of legal prejudice, seemingly leaving those issues open. For this reason alone, we hold that the collateral order doctrine does not apply.

***8** Second, Hernandez argues that "the Order of Dismissal resolved an important issue that is completely separate from the merits of the underlying action." According to Hernandez, the order from which he appeals addressed only "the important procedural issue of whether a defendant would be prejudiced if a plaintiff were permitted to file an action in Kansas, conduct discovery, select experts and otherwise litigate under Kansas law for two years, then opt for trial pursuant to the law of another state." Once again, Hernandez mischaracterizes the actual ruling of the trial court. A close reading of the trial court's decision demonstrates that it was not based on a definitive determination that plaintiffs would refile their lawsuit in Missouri, nor did the trial court address any of Hernandez' allegations of legal prejudice other than the issue of caps on noneconomic damages or lack thereof in Missouri.

Third, Hernandez argues that the order of dismissal will never be reviewable in the absence of this court exercising jurisdiction over this appeal. In support, he argues that Missouri courts are required to give full faith and credit to Kansas decisions. Because the first two elements that must be fulfilled to apply the collateral order doctrine are not satisfied for the reasons discussed earlier, we do not need to address this argument.

Dismissed for lack of appellate jurisdiction.

All Citations

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