Winter 1981

Civil Procedure - Res Judicata - Effect of Dismissal with Prejudice

Judy Cornett
University of Tennessee, Knoxville, tahamtan@vols.utk.edu

RECENT DEVELOPMENTS

Civil Procedure — Res Judicata — Effect of Dismissal With Prejudice

Garrett v. Corry Foam Products, Inc., 596 S.W.2d 808 (Tenn. 1980).

Plaintiff brought an action against his employer under the Tennessee Workers' Compensation Statute,[1] seeking compensation for an injury arising out of and in the course of his employment. Defendant, asserting the defense of res judicata, moved for summary judgment.[2] Affidavits and exhibits filed with the motion showed that plaintiff had sued defendant previously on the same cause of action.[3] The previous suit had been dismissed with prejudice by a consent order signed by the parties' attorneys.[4] The trial court dismissed the action. On appeal to the Supreme Court of Tennessee,[5] *held*, reversed and remanded. The words "with prejudice" in an order of dismissal by consent are ineffective to transform the dismissal into a judgment on the

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1. TENN. CODE ANN. §§ 50-901 to -1029 (Supp. 1980). The phrase "workman's compensation" was changed to "workers' compensation" by the Tennessee General Assembly in 1980. Act of March 11, 1980, ch. 534, 1980 Tenn. Pub. Acts 121.

2. TENN. R. CIV. P. 56. In order to grant the motion the trial court had to find that there was "no genuine issue as to any material fact" and that defendant was "entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.03.

3. Submitted with the motion were the affidavit of the clerk of the court and the pleadings and orders in the previous action. There was no mention or evidence of settlement or release. Garrett v. Corry Foam Prods., Inc., 596 S.W. 2d 808, 809 (Tenn. 1980).

4. The order was not signed by either of the parties. *Id.* at 808.

5. Appeal in workers' compensation cases is direct from the trial court to the supreme court. TENN. CODE ANN. § 50-1018 (1977).

merits which will bar a subsequent suit between the same parties on the same cause of action. *Garrett v. Corry Foam Products, Inc.*, 596 S.W.2d 808 (Tenn. 1980).

One purpose of a system of civil procedure is to strike a balance between the interest in attaining a just resolution of conflicts and the interest in achieving an end to litigation.[6] The doctrine of res judicata is an attempt to ensure both justice and finality for the parties to a suit. Under this doctrine, a final judgment on the merits in a previous suit will preclude a subsequent suit between the same parties on the same cause of action.[7] When the previous judgment is unfavorable to the plaintiff, the judgment is a bar to the plaintiff's maintenance of the subsequent suit.[8] Finality is achieved by the preclusion of another suit while justice is protected by the requirement that the previous judgment must have been on the merits.[9] In deciding whether to sustain a defense of res judicata in a particular case, the court must determine whether the previous judgment was on the merits.[10] Difficulty arises when the former suit was terminated at some point prior to a trial or a hearing on the facts and issues.[11] At issue in *Garrett* was the effect of a consent order of dismissal which, by use of the words "with prejudice," purported to bar a subsequent suit.[12] The court had to decide whether the judgment was a bar under the doctrine of res judicata.

It is not clear when dismissals with prejudice came into

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6. Moulton v. Ford Motor Co., 533 S.W.2d 295, 296 (Tenn. 1976).

7. Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

8. RESTATEMENT OF JUDGMENTS § 48 (1942).

9. The United States Supreme Court has held that "there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit." Haldeman v. United States, 91 U.S. 584, 585 (1875).

10. The Restatement (Second) of Judgments suggests that the phrase "on the merits" is not a test but a conclusion; that is, the phrase is merely descriptive of a judgment which will operate as a bar. RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment e (Tent. Draft No. 1, 1973).

11. 65 HARV. L. REV. 818, 836 (1952).

12. Other issues discussed by the court but not critical to the holding were the special statutory requirements for judgments in workers' compensation cases and the fact that the parties themselves did not sign the order of dismissal. 596 S.W.2d at 810-11. *See* text accompanying notes 77-81 *infra*.

use;[13] the dismissal probably originated as the converse in law to the dismissal without prejudice in equity.[14] While a dismissal

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13. At common law there was no dismissal in actions at law. An action could be terminated in the defendant's favor by a verdict, by the sustaining of a demurrer, or by a discontinuance, nonsuit, *non prosequitur*, *nolle prosequi*, or *retraxit*. Bond v. McNider, 25 N.C. (3 Ired.) 440 (1843). A discontinuance, nonsuit, or *non prosequitur* resulted from merely procedural defects in the action and did not bar a subsequent suit on the same cause of action. 3 W. BLACKSTONE, COMMENTARIES *296; 1 E. COKE, INSTITUTES (pt. 1) *139.a. (15th ed. London 1794) (1st ed. n.p. n.d.); 2 W. TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH 867-68 (3d Am. ed. Philadelphia 1840) (9th ed. London 1828). A *nolle prosequi* resulted from defects in the substance of the action, either as to one defendant or one issue, while a *retraxit* involved a defect in the substance of the action as a whole. Both a *nolle prosequi* and a *retraxit* were ordinarily bars to subsequent actions. 1 W. TIDD, *supra*, at 681-83; Beecher's Case, 77 Eng. Rep. 559 (K.B. 1608); 4 G. JACOB, THE LAW-DICTIONARY 397 (1st Am. ed. New York & Philadelphia 1811); 5 G. JACOB, THE LAW-DICTIONARY 523 (1st Am. ed. New York & Philadelphia 1811). The dismissal originated in equity. *See* Lloyd v. Powis, 1 Dickens 16 (Ch. 1671). A bill could be dismissed for lack of prosecution or because "the plaintiff had no title to the relief sought by his bill." J. MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY 196 (2d ed. Dublin 1795) (1st ed. n.p. n.d.). Dismissal for the latter reason was, like the *nolle prosequi* and *retraxit* at law, a bar to a subsequent suit on the same cause of action; a dismissal for lack of prosecution, however, like a discontinuance, nonsuit, or *non prosequitur* at law, was not a bar to a subsequent suit. *Id.* In accordance with his extraordinary powers as the keeper of the King's conscience, 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 33-35 (5th ed. San Francisco 1941), the Chancellor had a power which the law judges did not: the power to provide that a dismissal of a bill based on the determination that the plaintiff had no right to relief would not be a bar to a subsequent suit, J. MITFORD, *supra*, at 196. The Chancellor exercised this power by dismissing the bill without prejudice to the plaintiff's right to maintain a subsequent action. *Id.* The separate systems of law and equity with their attendant procedures became part of the law of Tennessee. J.W. Kelly & Co. v. Conner, 122 Tenn. 339, 360, 123 S.W. 622, 627 (1909). Gradually, many of the common-law procedural rules were modified by statutory and case law. *See, e.g.*, B.E. Dodd & Son v. Nashville, C. & St. L. Ry., 120 Tenn. 440, 110 S.W. 588 (1908); Littlejohn v. Fowler, 45 Tenn. (5 Cold.) 284, 288 (1868); Armstrong v. Harrison, 38 Tenn. (1 Head) 379 (1858); Graham v. Cook, 14 Tenn. (6 Yer.) 404 (1834); Johnston v. Ditty & Smith, 15 Tenn. (7 Yer.) 85 (1834).

14. "This term ['with prejudice'] has a well-recognized legal import; it is the converse of the term 'without prejudice' and is conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff." Union Indem. Co. v. Benton County Lumber Co., 179 Ark. 752, 761, 18 S.W.2d 327, 330 (1929). The fusion between courts of law and equity in

without prejudice entered by the Chancellor provided that an adjudication on the merits would not bar a subsequent suit, a dismissal with prejudice entered by the law judge provided that an adjudication not on the merits would bar a subsequent suit. Originally, therefore, the emphasis was upon the involuntary nature of a dismissal with prejudice. Gradually, dismissal with prejudice came to be used in both voluntary and consent dismissals; such dismissals were identified with the *retraxit*, a procedure in actions at law by which the plaintiff voluntarily relinquished his cause of action.[15] A *retraxit* was the plaintiff's "voluntary acknowledgment that he [had] no cause of action."[16] It was "an open and voluntary renunciation of his suit in court."[17] By a *retraxit* the plaintiff did more than admit he had not produced enough evidence to support his cause of action, as in a nonsuit: he admitted that he had no cause of action at all.[18] Therefore, a *retraxit* was an absolute bar to a subsequent suit on the same cause of action[19] and could not be entered by the plaintiff's attorney but only by the plaintiff himself in open

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many states eliminated the distinctions between their respective procedures. Even in Tennessee there was some confusion about the proper court for the application of each set of rules. *See* B.E. Dodd & Son v. Nashville, C. & St. L. Ry., 120 Tenn. 440, 110 S.W. 588 (1908) (court of law has no power to enter dismissal without prejudice); Ford v. Bartlett, 62 Tenn. (3 Bax.) 20 (1873) (discontinuance applies only in courts of law, not in courts of equity).

15. Kronkright v. Gardner, 31 Cal. App. 3d 214, 219, 107 Cal. Rptr. 270, 273 (1973) (dismissal of an action with prejudice is a *retraxit*); Robinson v. Hiles, 119 Cal. App. 2d 666, 672, 260 P.2d 194, 197 (1953) (a dismissal with prejudice is "the modern name for a retraxit"); Steele v. Beaty, 215 N.C. 680, 2 S.E.2d 854 (1939) (plaintiff's statement in open court agreeing to a dismissal is a *retraxit*); Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 826-27, 91 S.E.2d 415, 420 (1956) (consent dismissal with prejudice has the effect of a *retraxit*).

16. Beecher's Case, 77 Eng. Rep. at 563.

17. 3 W. BLACKSTONE, COMMENTARIES *296.

18. "At common law a retraxit differed from a voluntary withdrawal by the plaintiff of his action, in that a retraxit terminated both the action and the right of action, while such a withdrawal terminated the action only, leaving in the plaintiff the right to recommence his suit upon the same alleged right." Harvey v. Boyd, 24 Ga. App. 561, 561, 101 S.E. 708, 708 (1919) (Luke, J.; syllabus by the court).

19. 1 E. COKE, *supra* note 13, at *139.a; 3 W. BLACKSTONE, COMMENTARIES *296.

court.[20] The *retraxit* also was equated with consent dismissals which were not expressly with prejudice.[21] Since both the *retraxit* and an adjudication on the merits had the same effect—to bar a subsequent suit on the same cause of action—the same dismissal which was seen as a *retraxit* in some states was seen as an adjudication on the merits in other states.[22]

In *Lindsay v. Allen*[23] the Tennessee Supreme Court rejected the equation of a dismissal by consent with the *retraxit*.[24] Defendant demurred to a bill filed "to enjoin the removal of the county seat of Campbell County from Jacksboro to LaFollette"[25] on the ground that an earlier suit for the same purpose filed by another group of citizens had been dismissed. In reversing the Chancellor's dismissal of the bill on this ground, the court construed the prior dismissal as a consent decree by which plaintiffs dismissed the action in consideration of the payment of costs by

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20. Beecher's Case, 77 Eng. Rep. at 559.

21. *E.g.*, Bardach Iron & Steel Co. v. Tenenbaum, 136 Va. 163, 171, 118 S.E. 502, 505 (1923); Hoover v. Mitchell, 66 Va. (25 Gratt.) 387, 388 (1874); Pethtel v. McCullough, 49 W. Va. 520, 522, 39 S.E. 199, 200 (1901).

22. In some states dismissals by consent have been treated as adjudications on the merits. *See* Root v. Topeka Water Supply Co., 46 Kan. 183, 186-87, 26 P. 398, 399 (1890); Bank of the Commonwealth v. Hopkins, 32 Ky. (2 Dana) 395, 395 (1834). In other states the words "with prejudice" are sufficient to make the dismissal an adjudication on the merits. *E.g.*, DeGraff v. Smith, 62 Ariz. 261, 269, 157 P.2d 342, 345 (1945); Harris v. Moye's Estate, 211 Ark. 765, 767-68, 202 S.W.2d 360, 362 (1947); *In re* Estate of Crane, 343 Ill. App. 327, 344-46, 99 N.E.2d 204, 212-13 (1951); Pulley v. Chicago, Rock I. & Pac. Ry., 122 Kan. 269, 270, 251 P. 1100, 1101 (1927); Mayflower Indus. v. Thor Corp., 17 N.J. Super. 505, 511, 86 A.2d 293, 296 (Chan. Div. 1952). In other cases there is an implication that a dismissal with prejudice is considered an adjudication on the merits only where there is evidence of a compromise settlement. *See, e.g.*, Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959); Denny v. Mathieu, 452 S.W.2d 114 (Mo. 1970); Max v. Spaeth, 349 S.W.2d 1 (Mo. 1961). At least one state has incorporated the dismissal with prejudice into its rules of civil procedure, providing that such a dismissal "bars the assertion of the same cause of action or claim against the same party." Mo. R. Civ. P. 67.03.

23. 112 Tenn. 637, 82 S.W. 171 (1904).

24. The court's rejection of *retraxit* was stated in broad terms: "We have no case in this State applying the rule of 'retraxit,' and we shall not now adopt it." *Id.* at 654, 82 S.W. at 174. The court's definition of the term, however, clearly limited it to dismissals by consent. *Id.* at 653, 82 S.W. at 173.

25. *Id.* at 644, 82 S.W. at 171.

defendant.[26] The court noted that a consent decree is binding upon the parties to it and cannot be appealed,[27] but rejected the proposition that "the mere dismissal of a cause by consent of parties will bar a future action."[28] Although the question in *Lindsay* was one of collateral estoppel rather than res judicata,[29] the court quoted with approval from one of the landmark res judicata cases, *Haldeman v. United States*:[30]

> There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. . . . Suits are often dismissed by the parties, and a general entry is made to that effect, without incorporating in the record, or even placing on file the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement . . . is a withdrawal of a suit on terms, which may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it.[31]

Thus, the court in *Lindsay* indicated that a consent decree will be given res judicata effect only when it appears that the prior suit was dismissed pursuant to a settlement or adjustment of rights between the parties.[32]

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26. *Id.* at 650, 82 S.W. at 173. The court did not have the prior decree before it and thus construed it alternatively as a voluntary dismissal and as a dismissal by consent, reaching the same result under both constructions.

27. The court cited numerous cases involving consent decrees. *Id.* at 654, 82 S.W. at 174.

28. *Id.* at 655, 82 S.W. at 174.

29. Since the second suit did not involve the same parties, the question was whether the previous dismissal would bar the subsequent suit by different plaintiffs. RESTATEMENT OF JUDGMENTS §§ 86, 93 (1942) (discussing persons bound by a prior adjudication).

30. 91 U.S. 584 (1875).

31. *Id.* at 586, *quoted in* Lindsay v. Allen, 112 Tenn. 637, 652-53, 82 S.W. 171, 174 (1904).

32. This principle was followed in Third Nat'l Bank v. Scribner, 212 Tenn. 400, 370 S.W.2d 482 (1963), in which the court adopted the general rule that consent judgments have the same res judicata effect as judgments rendered after a trial or hearing on the merits. The court held that an order of dismissal by consent which recited that the parties "have compromised and

The effect of a consent dismissal with prejudice was first considered by the Tennessee Supreme Court in *Long v. Kirby-Smith.*[33] As a result of a three-vehicle accident, plaintiffs brought a personal injury action against three defendants. They entered into a covenant not to sue[34] with two of the defendants. Pursuant to this agreement a consent order[35] was entered dismissing the action against the two defendants "with full prejudice."[36] A jury verdict was rendered against the third defendant, who appealed on the ground that the dismissal "with full prejudice" was an adjudication on the merits barring any further suit on the same cause of action.[37]

The court of appeals first determined that the words "with full prejudice" did not make the dismissal a bar; the words were "in themselves ambiguous and uncertain."[38] In order to ascertain the meaning of the words, the court looked to the covenant not to sue[39] and held that the words "with full prejudice" meant "with the full prejudice provided for in plaintiffs' covenant not to sue."[40] Because the covenant provided that plaintiffs could sue the two defendants again, with defendants allowed to plead the covenant as a "set off or Recoupment,"[41] the court held that the order of dismissal was not a bar to the suit against the third defendant. In its holding the court emphasized the consensual

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settled all the matters in controversy and evidenced same by a written agreement," *id.* at 404, 370 S.W.2d at 484, was an adjudication on the merits and thus a bar to a subsequent suit between the same parties on the same cause of action, *id.* at 410, 370 S.W.2d at 487.

33. 40 Tenn. App. 446, 292 S.W.2d 216 (1956).

34. The parties agreed that the document was a covenant not to sue and not a release. *Id.* at 450-51, 292 S.W.2d at 218.

35. Each plaintiff entered such an order, each identical except for the plaintiff's name. The court quoted from only one. *Id.* at 451, 292 S.W.2d at 218.

36. The parties themselves did not sign the orders. *Id.* at 451, 292 S.W.2d at 218.

37. *Id.* at 452, 292 S.W.2d at 219.

38. *Id.* at 454, 292 S.W.2d at 220.

39. "So we think these orders of dismissal must be read and construed with the covenant not to sue, on which such orders were based . . . ." *Id.* at 455, 292 S.W.2d at 220.

40. *Id.*, 292 S.W.2d at 220.

41. *Id.*, 292 S.W.2d at 220.

nature of the dismissal. In accordance with the principle set out in *Lindsay*,[42] the court looked to the substance of the parties' agreement to determine what was settled by the dismissal.

The court, however, offered a second reason why the order could not be a bar to the action against the third defendant: "[T]he Trial Court had no jurisdiction to enter such a decree."[43] In a misleading discussion of the history of dismissals with and without prejudice, the court noted that the power to dismiss with or without prejudice originally was the Chancellor's alone.[44] The court reasoned that since Tennessee has retained separate courts of law and equity the powers of a law judge in Tennessee do not include the powers of the Chancellor; therefore, the judge of a law court has no power to enter a dismissal with prejudice.[45] Although this conclusion would have been apposite to an involuntary dismissal with prejudice, it fails to explain adequately why the parties could not effectively agree to make the judgment a bar by use of the words "with prejudice." The court, relying on *Lindsay*, apparently reasoned that the parties were attempting a *retraxit* and that the dismissal was ineffective as a bar since *retraxit* is not recognized in Tennessee.[46] By failing to note the

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42. *See* notes 23-32 *supra* and accompanying text.

43. 40 Tenn. App. at 456, 292 S.W.2d at 220.

44. The court accepted the modern misapprehension that a dismissal of a bill in equity that was not without prejudice was automatically with prejudice and a bar to a subsequent suit. *Id.*, 292 S.W.2d at 220. This is misleading. The sources unanimously state that in order to plead a prior adjudication in bar of an action, the defendant had to show that the previous suit was determined after a hearing on the merits. A prior judgment on the merits that was without prejudice could not be pleaded in bar. If there had been a converse exception—if a dismissal with prejudice could be pleaded in bar—the sources certainly would so state, and they do not. J. MITFORD, *supra* note 13, at 196; G. COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 270 (New York 1813); F. VAN HEYTHUYSEN, THE EQUITY DRAFTSMAN 431-32 (1st Am. ed. New York 1819); 1 J. SMITH, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY 221-22 (2d Am. ed. Philadelphia 1842) (1st ed. London 1835). Moreover, since the role of the Chancellor was to ameliorate the harshness resulting from the strict application of legal rules, it would be anomalous if his discretion, the tool by which such relief was afforded, could be used to achieve a result even harsher than that reached by the application of legal rules.

45. 40 Tenn. App. at 456-58, 292 S.W.2d at 221-22.

46. *Id.* at 456, 292 S.W.2d at 221.

narrow definition of *retraxit* in *Lindsay*, the court broadened the rejection of *retraxit* to encompass dismissals with prejudice. In determining whether an order of dismissal operates as res judicata, the court said, "The decisive test is whether the judgment of dismissal was on the merits . . . ."[47] Since the court found that the dismissal was not on the merits, the words "with full prejudice" were "disregarded as surplusage."[48]

The *Long* decision set Tennessee apart from other jurisdictions in several important respects. First, the court in *Long* clearly held that the phrase "with prejudice" has no "well-recognized legal import"[49] in Tennessee: the words are to be construed in light of the order itself and any agreement upon which it is based. Second, by its misplaced reliance on *Lindsay*, the court broadened the rejection of *retraxit* to include not only dismissals by consent but also dismissals with prejudice. Third, by requiring that to be a bar the dismissal must have been on the merits, the court did explicitly in its second line of reasoning what it had done implicitly in its first line of reasoning. The court accepted the principle of res judicata approved in *Lindsay*: no matter what the form of the dismissal or the phrases used in it, the court will determine its res judicata effect on the basis of a showing of what the dismissal in fact settled.[50] The plaintiff's right to an adjudication on the merits cannot be defeated.

In another case involving the effect of a dismissal with prejudice, *Patrick v. Dickson*,[51] the Supreme Court of Tennessee used *Long* as a touchstone in holding that the dismissal with prejudice of a paternity action in juvenile court for failure to prosecute[52] was not a bar to a subsequent paternity suit between the same parties. The words "with prejudice" were "a nullity"

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47. 40 Tenn. App. at 458, 292 S.W.2d at 221.

48. *Id.*, 292 S.W.2d at 222.

49. Union Indem. Co. v. Benton County Lumber Co., 179 Ark. 752, 761, 18 S.W.2d 327, 330 (1929).

50. *See* Haldeman v. United States, 91 U.S. 584, 586 (1875), *quoted with approval in* Lindsay v. Allen, 112 Tenn. 637, 652-53, 82 S.W. 171, 174 (1904).

51. 526 S.W.2d 449 (Tenn. 1975).

52. Although the order did not state the reason for the dismissal, in light of plaintiff's failure to appear for trial, the supreme court treated the dismissal as one for failure to prosecute. *Id.* at 450.

because the dismissal was not on the merits.[53] Although the court thus affirmed the basic principle set out in *Long*, it noted a significant new element present in *Patrick*: the Tennessee Rules of Civil Procedure. After quoting the *Long* court's determination that law judges have no power to dismiss cases with or without prejudice, the court went on to say, "The present practice is governed by Rule 41 of the Tennessee Rules of Civil Procedure, but, as aforesaid, these rules do not apply to the juvenile court. That court continues to be governed by the common law rules of *Long* . . . ."[54]

Rule 41 of the Tennessee Rules of Civil Procedure, which became effective January 1, 1971,[55] governs dismissal of actions.[56] Incorporated into Rule 41 is the juxtaposition of the dis-

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53. *Id.* at 453. Whether the dismissal was on the merits was important for another reason: pursuant to TENN. CODE ANN. § 28-106 (1955) (current version at TENN. CODE ANN. § 28-1-105 (1980)), plaintiff had the right to bring a second action within one year of the dismissal of the first if the dismissal was not on a ground "concluding [her] right of action." *Id.*

54. 526 S.W.2d at 453.

55. TENN. R. CIV. P. 1 (compiler's notes 1977) (stating effective date of the Rules).

56. Rule 41 provides:

> 41.01. Voluntary dismissal—Effect thereof. — (1) Subject to the provisions of Rule 23.03 or Rule 66 and 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 or to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause; 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. . . .
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> (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 included [*sic*] the same claim.
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> 41.02. Involuntary dismissal — Effect thereof. — (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . .
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> (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for

missal without prejudice[57] and the dismissal which operates as "an adjudication on the merits."[58] This juxtaposition suggests acceptance of the equation between dismissals with prejudice and dismissals which are adjudications on the merits by indicating that adjudication on the merits, like with prejudice, is the opposite of without prejudice.[59] This concept is incompatible with *Long*[60] and *Patrick*,[61] both of which indicated that in Tennessee the phrase "with prejudice" is not equivalent to "on the merits." Nevertheless, following the reasoning of the court in *Patrick*, the effect of the dismissal of an action in a court in which the Rules of Civil Procedure apply[62] would be determined by Rule 41.

Another development related to the res judicata effect of dismissals was the abandonment in the Restatement (Second) of Judgments of the requirement that to be a bar the former adjudication must have been on the merits.[63] The Restatement (Second) of Judgments notes that the interest in finality may require that the former judgment be a bar "even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his reme-

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improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

57. TENN. R. CIV. P. 41.01(1).

58. TENN. R. CIV. P. 41.01(2) and 41.02(3).

59. A dismissal not without prejudice is equivalent to a dismissal with prejudice. A dismissal not without prejudice is also equivalent to an adjudication on the merits. Therefore, a dismissal with prejudice is the equivalent of an adjudication on the merits.

60. *See* notes 33-50 *supra* and accompanying text.

61. *See* notes 51-54 *supra* and accompanying text.

62. The Rules apply to procedure in the circuit and chancery courts and courts of like jurisdiction. TENN. R. CIV. P. 1.

63. *Compare* RESTATEMENT (SECOND) OF JUDGMENTS § 48 (Tent. Draft No. 1, 1973): "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim," *with* RESTATEMENT OF JUDGMENTS § 48 (1942): "Where a valid and final personal judgment is rendered *on the merits* in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action." (emphasis added). In Tennessee the courts have held consistently that to constitute a bar to a subsequent suit, a prior adjudication must have been on the merits. Hurst v. Means, 34 Tenn. (2 Sneed) 546, 547 (1855); First Nat'l Bank v. Ivie, 41 Tenn. App. 187, 197, 293 S.W.2d 34, 38 (1955) and cases cited therein.

dies in the first proceeding."[64] A prior dismissal, therefore, can bar a subsequent suit. Even if a subsequent suit is barred, however, the interest in justice receives considerable protection from the more liberal pleading and amendment provisions of the Federal Rules of Civil Procedure and similar state rules.[65]

In *Garrett v. Corry Foam Products, Inc.*[66] the Supreme Court of Tennessee faced squarely the problem of determining the effect of a dismissal with prejudice. The court's rationale indicated that common-law rules of procedure and traditional notions of res judicata still play a role in the determination of procedural questions. There were two ways in which the court could have found that the prior dismissal constituted a bar to the subsequent action. First, the court could have focused on the order of dismissal itself and could have considered both its consensual nature and its use of the phrase "with prejudice." Quoting extensively from *Long*, the court affirmed that *retraxit* is not recognized in Tennessee;[67] therefore, the dismissal could not automatically be equated with a *retraxit* so as to bar a subsequent suit. Unfortunately, it is uncertain whether the court realized that it had rejected *retraxit* as the equivalent of both a consent dismissal and a dismissal with prejudice. Since the order itself provided no evidence that there had been any settlement or adjustment of rights between the parties,[68] under traditional notions of res judicata the order did not constitute a judgment on the merits. Clearly, therefore, the court followed *Long* in eschewing the determination of res judicata solely on the basis of the form of the dismissal or its use of the meaningless phrase "with prejudice."

Second, the court could have looked beyond the order itself to the entire record in the previous suit. The court did in fact

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64. RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment a (Tent. Draft No. 1, 1973).

65. RESTATEMENT (SECOND) OF JUDGMENTS § 48, Reporter's Note to Comment d, 43 (Tent. Draft No. 1, 1973).

66. 596 S.W.2d 808 (Tenn. 1980).

67. *Id.* at 810.

68. The only phrase that conceivably could have been interpreted as evidence of an agreement or settlement was "for reasons satisfactory to the Court," which the supreme court evidently found to be too vague and ambiguous to indicate a settlement. *Id.* at 809.

peruse the entire record,[69] but apparently found no evidence of an agreement with which to construe the phrase "with prejudice," as the court in *Long* had done. The court found that the previous judgment "was not a determination of the plaintiff's right of action *on the merits*, unless the words 'with prejudice' can be held to have had that effect."[70] Thus, in neither the order of dismissal itself nor in the record of the previous suit did the court find evidence of an adjudication on the merits.

The court did not attempt to harmonize its decision with Rule 41 of the Tennessee Rules of Civil Procedure;[71] the court simply stated that "nothing in either the text of that rule or in the committee comments thereto changes the law hereinabove discussed, i.e., that *retraxits* are not recognized in Tennessee."[72] In fact, Rule 41 does not encompass the situation in *Garrett*: a dismissal by consent which purported to operate as an adjudication on the merits.[73] Therefore, *Garrett* exemplifies one situation in which the Rules of Civil Procedure will have to be supplemented by common-law procedural rules.

Even more significant was the court's implicit rejection of the less stringent standard for res judicata espoused by the Restatement (Second) of Judgments.[74] The court did not ask whether the plaintiff had an opportunity to litigate the matter fully in the first action; rather, the court asked whether the is-

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69. *Id.*

70. *Id.*

71. *See* note 56 *supra*.

72. 596 S.W.2d at 810.

73. Rule 41.01 contemplates a situation in which the plaintiff voluntarily and unilaterally dismisses his action. The rule generally provides that such a dismissal will be without prejudice and prescribes the one situation in which a dismissal will be an adjudication on the merits. TENN. R. CIV. P. 41.01(2). Rule 41.02 contemplates a situation in which the judge, either on motion of the defendant or upon a determination under another rule, dismisses the plaintiff's action. The rule provides generally that such a dismissal will operate as an adjudication on the merits except that dismissals for lack of jurisdiction, improper venue, or lack of an indispensable party are not adjudications on the merits. TENN. R. CIV. P. 41.02(3). No provision of Rule 41 deals with the situation in *Garrett*, in which both parties agreed to the dismissal and as part of their agreement attempted to decide its res judicata effect.

74. *See* notes 63-65 *supra* and accompanying text.

sues had in fact been determined in the prior suit. In *Garrett* the court made clear that the standard of res judicata which will be applied when the prior suit was dismissed by consent is the traditional standard[75] approved in *Lindsay*: "There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively."[76]

Unfortunately, the court discussed two issues which might appear to narrow the holding but which in fact should not. First, the court declared that "an additional reason" for its holding was the fact that the dismissal order was signed only by the parties' attorneys and not by the parties themselves.[77] The issue was not whether the absence of the parties' signatures implied their lack of consent to the dismissal; rather, the question discussed by the court was whether the absence of the parties' signatures was determinative of the res judicata effect of the dismissal. Since the *retraxit* is not recognized in Tennessee, the order could not have been a *retraxit* even if signed by the parties. The absence of the parties' signatures was not determinative because, under the court's analysis, the order of dismissal would have had no greater power with the parties' signatures than it had without them. Because it was not an adjudication on the merits, the prior dismissal in *Garrett* would not have barred the subsequent suit even if the order had been signed by the parties.

The second issue addressed by the court was the particular statutory requirements for settlements in workers' compensation cases.[78] Noting that the order of dismissal did not contain a

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75. 596 S.W.2d at 809. "A party who asserts the defense of *res judicata* or estoppel by judgment has the burden of proving it and must show that the right in question was determined *on the merits* in the former judgment." *Id.* (citations omitted).

76. Haldeman v. United States, 91 U.S. 584, 586 (1875), *quoted in* Lindsay v. Allen, 112 Tenn. 637, 652-53, 82 S.W. 171, 174 (1904).

77. 596 S.W.2d at 810.

78. *Id.* at 811. TENN. CODE ANN. § 50-1006 (Supp. 1980) provides:

> Settlement between parties to be approved by court—Costs—Parties.—The interested parties shall have the right to settle all matters of compensation between themselves, but all settlements, before the same are binding on either party, shall be reduced to writing and shall be approved by the judge of the circuit court or of the

finding by the trial judge that the settlement was in the employee's best interest, the court said that the order "for this reason, too, is invalid as a judgment on the merits."[79] The court's emphasis on the principles of *Long* made clear that it rejected this more narrow basis for its holding in favor of a broader holding applicable not just to workers' compensation cases. If the order of dismissal had contained a finding that the "settlement [was] . . . for the best interest of the employee,"[80] there necessarily would have been evidence of the settlement, and the court, therefore, would have found that the dismissal was on the merits. The requirement that to be a bar the consent dismissal must have been on the merits in traditional res judicata terms is applicable to all actions, including workers' compensation suits.

The court's message to the practitioner is unmistakable. When an action is dismissed by consent because of a settlement, the fact of settlement must be reflected in the record. If it is not feasible to file the written agreement with the court, the order of dismissal should at least reflect the fact that a settlement has been reached. If no settlement or adjustment of rights has been made, the defendant cannot expect protection from a subsequent suit by the use of the words "with prejudice" in the dismissal order. If the phrase "with prejudice" was ever known as a

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chancery court or criminal court of the county where the claim for compensation is entitled to be made. It shall be the duty of the judge of the circuit court or of the chancery court or criminal court to whom any proposed settlement shall be presented for approval under this law, to examine the same to determine whether the employee is receiving, substantially, the benefits provided by the Workers' Compensation Law. . . . Upon such settlement being approved, judgment shall be rendered thereon by the court and duly entered by the clerk. . . . Notwithstanding any other provision of this section, whenever there is a dispute between the parties as to whether or not a claim is compensable or the amount of compensation due, the parties may settle such matter without regard to whether the employee is receiving substantially the benefits provided by the Workers' Compensation Law provided such settlement is approved by a court having jurisdiction of workers' compensation cases and provided further such settlement is found by the court to be for the best interest of the employee.

79. 596 S.W.2d at 811.

80. TENN. CODE ANN. § 50-1006 (Supp. 1980).

shorthand way to indicate that a suit had been settled, it can no longer be accorded that status.

The implication of the court's holding in *Garrett* is that a plaintiff will not be allowed to relinquish voluntarily his cause of action without a settlement or some adjustment of rights between the parties; that is, a plaintiff cannot defeat his own right to an adjudication on the merits. This is the policy embodied with certain limitations in Rule 41.01 of the Tennessee Rules of Civil Procedure[81] regarding voluntary dismissals; a dismissal should not have a greater effect because the plaintiff has secured the defendant's consent to the dismissal. Although arguments of judicial economy might be made for automatically equating a consent dismissal or a dismissal with prejudice with an adjudication on the merits which will bar a subsequent suit, the competing interest in justice is better served by not according any such talismanic quality to a particular form or to particular words. Likewise, an inference of settlement should not be drawn from the consensual nature of a dismissal, which may have resulted from social or economic pressures.[82] Adherence to traditional notions of res judicata requires that evidence of a settlement or of some adjustment of rights be shown before the prior dismissal will constitute a bar. If there has been a settlement, such a showing would not be burdensome.

In *Garrett v. Corry Foam Products, Inc.* the Tennessee Supreme Court clearly announced its intention to apply traditional notions of res judicata in determining whether a prior dismissal will bar a subsequent suit between the same parties on the same cause of action. Neither the consensual nature of a dismissal nor its use of the words "with prejudice" is evidence of an adjudication on the merits. The court made clear that either the order of dismissal itself or the record in the previous action must show an actual settlement or adjustment of rights between the parties.

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81. *See* note 56 *supra*.

82. That such pressures might force a dismissal is especially true when, as in the principal case, there is an employer-employee relationship. The employee's fear of possible future reprisals by the employer, coupled with the inherent inequality of bargaining power between the employer and the employee, conceivably could influence the employee to agree to a consent dismissal with prejudice. *See* 2 A. LARSON, WORKMEN'S COMPENSATION § 68.36 (Desk ed. 1980).

In *Garrett* the court demonstrated both a salutary regard for assuring justice through procedural safeguards and an admirable determination not to sacrifice the interest in a just resolution of conflicts to the interest in finality.

JUDY MAE CORNETT