

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION

**FILED**  
**September 30, 1997**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

CAROLYN S. STROUPE and )  
LARRY F. STROUPE ) SULLIVAN COUNTY  
 ) 03A01-9704-CV-00110  
 )  
Plaintiffs - Appellants )  
 )  
v. )  
 ) HON. RICHARD E. LADD,  
 ) JUDGE  
 )  
 )  
L. ALAN BACON, D. D. S. )  
 )  
 )  
Defendant - Appellee ) AFFIRMED AND REMANDED

DAVID W. BLANKENSHIP OF KINGSPORT FOR APPELLANTS  
DARRELL E. BAKER, JR., OF MEMPHIS FOR APPELLEE

O P I N I O N

Goddard, P. J.

This is a medical malpractice case brought for the third time by Carolyn S. Stroupe and her husband, Larry F. Stroupe, against her dentist, L. Alan Bacon.

The Trial Court sustained Dr. Bacon's motion for summary judgment on the ground that their claims were barred by the applicable statute of limitations,

The Stroupes appeal, contending the Chancellor was in error for two reasons. First, they say their right to file the present suit was preserved under the Saving Statute, T.C.A. 28-1-105. Secondly, they say there have been only two previous non-suits and, therefore, they are entitled to proceed under Rule 41 of the Tennessee Rules of Civil Procedure.

The facts pertinent to the resolution of this appeal are as follows:

August 14, 1992. Original lawsuit filed in the Circuit Court for Sullivan County.

July 13, 1994. Non-suit taken.

August 19, 1994. Claim re-filed against Dr. Bacon and another defendant in the Circuit Court for Knox County.

December 21, 1994. Case dismissed by Circuit Judge.

October 27, 1995. Order entered in this Court upon an appeal by the Stroupes vacating the Trial Judge's dismissal under the authority of Cronin v. Howe, 906 S.W2d 910 (Tenn. 1995)<sup>1</sup> decided during the pendency of that appeal, and remanding the case to the Circuit Court for Knox County for trial.

June 23, 1996. Non-suit taken as to Knox County case.

August 16, 1996. Case re-filed in Sullivan County against Dr. Bacon only.

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<sup>1</sup> Cronin, which counsel for both parties conceded was dispositive of the appeal, holds that a plaintiff could rely upon the Saving Statute and re-file within one year of non-suit, even though the non-suit and re-filing occurred beyond the three-year statute of repose.

The Code Section and Civil Rule central to disposition of this case are as follows:

**28-1-105. New action after adverse decision -- Contractual limitations periods.** -- (a) 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. Actions originally commenced in general sessions court and subsequently recommenced pursuant to this section in circuit or chancery court shall not be subject to the monetary jurisdictional limit originally imposed in the general sessions court. (Emphasis supplied.)

**41.01. Voluntary Dismissal -- Effect Thereof.** -- (1) Subject to the provisions of Rule 23.05 or Rule 66 or 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 to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; 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. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.

(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 including the same claim

It is the position of the Stroupes that under the procedural history of this case they are entitled to proceed under both the provisions of the Code Section and the Rule. They argue as to the Code Section that they come within the purview of the underlined provision of Subsection (a) in that the case was reversed on appeal, which allows them one year after the reversal to file a new action.

The fallacy of this insistence is that in the case reversed on appeal a judgment was not rendered in their favor in the trial court. Therefore, it was not necessary upon reversal that they be given an additional year, because under the terms of the order entered their suit was still viable because the order entered in this Court after vacating the Trial Court's judgment against them specifically remanded the case "for trial." Consequently, they were in a position to proceed to trial of their case in the Knox County Circuit Court but, instead, for reasons not readily apparent, chose to also non-suit that case.

Upon their doing so they were subject to the mandates of Payne v. Mitthews, 633 S.W2d 494 (Tenn. App. 1982), and Lillard v. Pinckley, an unreported opinion of this Court, filed in Nashville on November 9, 1995. Both of these cases hold that suit must be brought within one year after dismissal to come within the protection of the Saving Statute.

Payne also addresses Rule 41 and, in doing so, quotes from an earlier opinion by Judge Summers as follows, at page 496):

This Court has addressed the question of the possible conflict between T. C. A. Sec. 28-1-105 and Rule 41.01 of the Tennessee Rules of Civil Procedure in the case of Marie R. Ellison, et al. v. Browning-Ferris, et al in an unreported opinion by Judge Summers, filed December 15, 1980. Judge Summers writes for the Court:

The next question to be answered by this court is whether Rule 41.01 of the Tennessee Rules of Civil Procedure enlarges the time in which a party can refile after a voluntary nonsuit has been taken.

Rule 41.01 clearly states that a plaintiff shall have a right to take a voluntary nonsuit or to dismiss an action without prejudict (sic) subject to the provisions of Rule 23.03, Rule 66, "except when a motion for summary judgment made by the adverse party is pending," and of any statute. Rule 41.01 limits the number of dismissals (nonsuits) that can be taken. (Emphasis in original.)

We must therefore hold that T. C. A. Sec. 28-1-105 addresses itself to time while Rule 41.01 of the Tennessee Rules of Civil Procedure addresses itself to the number of dismissals (nonsuits) that can be taken. There is no conflict between the statute and the rule. (Emphasis in original.)

While Rule 41.01 T. R. C. P. gives a litigant the right to take two voluntary nonsuits, this right is subject to the provisions "of any statute," namely T. C. A. 28-1-105.

It is clear from the above authorities that regardless of how an inconclusive dismissal of an action is had, in order for a suit to survive, it must have been filed within one year of the date of dismissal of the original action--in this case, March 13, 1979.

For the above reasons, we hold that the trial judge was not in error when he dismissed the plaintiff's suit filed on October 28, 1980.

We concur in the foregoing analysis, vis-a-vis, the Saving Statute and Rule 41. We also point out that a case may be barred under Rule 41, although not by a statute of limitations. For example--and we concede the scenario suggested would be unlikely if the statute of limitations were one year, but certainly possible if three or ten years--a plaintiff could file three suits terminated by non-suit within the period of a statute of limitations, and subsequent to the last non-suit, a fourth suit, which was also within the statutory period. The fourth suit would be barred under Rule 41, not because of the statute of limitations, but because the third dismissal is deemed to be on the merits and under the theory of res judicata would bar another suit.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded to the Trial Court for collection of costs below. Costs of appeal are adjudged against the Stroupes and their surety.

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Houston M Goddard, P. J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMirray, J.