

THE SUPREME COURT OF ARKANSAS HOLDS THAT AFTER APPELLANT’S VOLUNTARY NONSUIT AT THE REQUEST AND WITH THE CONSENT OF APPELLEE, ARKANSAS RULE OF CIVIL PROCEDURE 41 DOES NOT REQUIRE THE DISMISSAL WITH PREJUDICE OF APPELLANT’S SECOND STATE COURT ACTION.

In *Richard v. Union Pacific Railroad Company*, the Supreme Court of Arkansas held that after Appellant Richard’s first personal injury action against Union Pacific was dismissed by voluntary nonsuit in a Texas federal court, the dismissal of his second state court action was not required to be with prejudice under Arkansas Rule of Civil Procedure 41, because the first dismissal was not unilateral.¹ Although “the record reflects that the notice of nonsuit in [the first action] was filed by Richard only” and “there was no . . . reference in the motion, or order granting the motion, that the nonsuit was being requested by both parties,” the Court gave weight to the specific facts of the case and declined to strictly interpret Rule 41.²

On March 28, 2008, Richard filed a personal injury action for negligence against Union Pacific, under the Federal Employers’ Liability Act, in the Federal District Court of Harris County, Texas.³ Over a year later, on October 14, 2009, “Richard filed a notice of nonsuit without prejudice” and the Texas court entered an order of nonsuit.⁴ On March 11, 2010, Richard refiled his action in Arkansas. Union Pacific later filed a motion to dismiss, alleging, among other things, “that it was entitled to dismissal with prejudice under Arkansas Rule of Civil Procedure 41(b)” because Richard voluntarily dismissed his suit in Texas.⁵

In response, Richard filed two affidavits.⁶ The first was by his own counsel, Todd Elias, and the second affiant was by Union Pacific’s counsel from the Texas action, Gordon Holloway.⁷ Both stated that the Texas action was dismissed because Union Pacific requested that Richard dismiss it.⁸ Holloway stated that he contacted Elias, and told him that Union Pacific wanted “to bring a third-party claim against an Arkansas company [that] was not subject to [jurisdiction] in Texas.”⁹ Holloway asked Elias to refile the

1. 2012 Ark. 129, at 12–13, 388 S.W.3d at 429.
2. *Id.* at 11–13, 388 S.W.3d at 428–29.
3. *Id.* at 1, 388 S.W.3d at 423.
4. *Id.*, 388 S.W.3d at 423.
5. *Id.* at 2, 388 S.W.3d at 423.
6. *Richard*, 2012 Ark. at 2–3, 388 S.W.3d at 423.
7. *Id.*, 388 S.W.3d at 423.
8. *Id.* at 2, 388 S.W.3d at 423.
9. *Id.*, 388 S.W.3d at 423.

case in Arkansas, and both parties agreed that they would dismiss the Texas case to accomplish this goal.¹⁰

At the hearing on Union Pacific's motion to dismiss, Richard argued that the two-dismissal rule in Arkansas Rule of Civil Procedure 41 was not applicable because the first dismissal of the Texas case was not a unilateral action.¹¹ Union Pacific argued that the complaint should be dismissed with prejudice, because the record did not reflect any joint agreement on dismissal by both parties.¹² The circuit court ruled that the complaint be dismissed because of errors in Richard's summons to Union Pacific.¹³ Additionally, the circuit court sided with Union Pacific in finding that the dismissal would be with prejudice.¹⁴ The circuit court strictly interpreted Rule 41(a) to require a dismissal with prejudice because there was not a written stipulation in the record of both parties agreeing to the dismissal without prejudice of the Texas case.¹⁵

On appeal, the Arkansas Supreme Court considered "whether the first dismissal in Texas trigger[ed] the two-dismissal rule under either Rule 41(a) or (b)."¹⁶ Arkansas Rule of Civil Procedure 41(a) provides in pertinent part:

(a) Voluntary Dismissal; Effect Thereof.

(1) Subject to the provisions of Rule 23(e) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

(2) A voluntary dismissal under paragraph (1) operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.¹⁷

Richard argued that the circuit court erred in dismissing with prejudice "because he did not unilaterally or voluntarily dismiss his cause of action against Union Pacific in Texas."¹⁸ Reiterating the statements of Holloway and Elias, Richard argued that Union Pacific agreed to the dismissal, and that the dismissal was originally their idea.¹⁹ Richard cited *Smith v. Wash-*

10. *Id.* at 2–3, 388 S.W.3d at 423–24.

11. *Richard*, 2012 Ark. at 2–3, 388 S.W.3d at 423–24.

12. *Id.* at 3, 388 S.W.3d at 424.

13. *Id.*, 388 S.W.3d at 424.

14. *Id.* at 3–4, 388 S.W.3d at 424–25.

15. *Id.* at 3, 388 S.W.3d at 424.

16. *Id.* at 4, 388 S.W.3d at 424.

17. ARK. R. CIV. PRO. 41(a).

18. *Richard*, 2012 Ark. at 5, 388 S.W.3d at 425.

19. *Id.*, 388 S.W.3d at 425.

ington²⁰ for the proposition that “the purpose . . . [of Rule 41] . . . is to prevent unreasonable use of the plaintiff’s unilateral rights to dismiss an action.”²¹ Richard asked that “the court . . . hold that the Texas dismissal did not count toward the two-dismissal rule” because the purpose of the rule would not be served by a strict interpretation.²² Union Pacific urged the court to affirm the circuit court’s dismissal because there was nothing in the record showing that Union Pacific agreed to the Texas nonsuit, unlike the *Smith* case, which involved a joint stipulation.²³

The Arkansas Supreme Court agreed with Richard, that the underlying purpose of Rule 41 would not be served by a strict interpretation.²⁴ In *Smith*, the court noted that “the intention [behind the two-dismissal rule] was to prevent delays and harassment by plaintiffs.”²⁵ Additionally, the court emphasized that when the purpose behind the two-dismissal rule would not be served by a literal application, a court must be careful to not apply it too broadly.²⁶

The Arkansas Supreme Court also looked to *Jonesboro Healthcare Center, LLC. v. Eaton-Moery*²⁷ for guidance. In *Jonesboro*, the plaintiff filed a complaint that was dismissed in district court due to lack of subject-matter jurisdiction, and then later filed the same complaint in circuit court.²⁸ On appeal, the Arkansas Supreme Court noted that “a dismissal for lack of subject-matter jurisdiction . . . [was] not within the plaintiff’s unilateral rights,” because jurisdiction could have been raised by the court or either party.²⁹ The court in *Jonesboro* also stated that a literal application of Rule 41(b) in the case would have brought about a harsh result that was not intended by the rule.³⁰

The Court ultimately relied upon the specific facts of the case in reaching their conclusion that a strict interpretation of Rule 41 would not further the purpose of the rule. The Court reversed the order of dismissal with prejudice, pointing out that “Union Pacific admit[ted] [in its brief on appeal] that it [did] not dispute . . . Richard dismissed his case in Texas at its request and with its agreement.”³¹ The Court reasoned that the Texas dismissal was

20. 340 Ark. 460, 10 S.W.3d 877 (2000).

21. *Richard*, 2012 Ark. at 5, 388 S.W.3d at 425.

22. *Id.* at 6, 388 S.W.3d at 425.

23. *Id.*, 388 S.W.3d at 425–26.

24. *Id.* at 12–13, 388 S.W.3d at 428–29.

25. *Id.* at 7, 388 S.W.3d at 426.

26. *Id.* at 8, 388 S.W.3d at 429–27 (citing 9 Charles A. Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE CIV. § 2368 (2d. ed 1995)).

27. 2011 Ark. 501, 9–11, 385 S.W.3d at 802–04.

28. *Id.* at 1–2, 385 S.W.3d at 798–99.

29. *Id.* at 10, 385 S.W.3d at 802–03.

30. *Id.* at 12, 385 S.W.3d at 804.

31. *Id.* at 11, 385 S.W.3d at 803.

not a unilateral action by Richard because the dismissal was ultimately for the benefit of Union Pacific.³² To reach any other conclusion would be in direct conflict with the purpose of Rule 41, and as the Court described, the results would be “harsh and draconian.”³³

This case is significant because it underscores the necessity of looking to the purpose of a rule to determine its application. Sometimes a party can meet the requirements of a rule, on its face, but fail to satisfy the underlying purpose of the law. This case shows that the Supreme Court of Arkansas will not strictly interpret Rule 41 in a manner that brings about unfair results not intended by the rule.

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32. *Id.* at 11–12, 385 S.W.3d at 803–04.

33. *Richard*, 2012 Ark. 149, at 12, 388 S.W.3d at 429.