FILED
07/18/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 14, 2021 Session

EMERGENCY MEDICAL CARE FACILITIES, P.C. v. BLUECROSS BLUESHIELD OF TENNESSEE, INC., ET AL.

Appeal from the Chancery Court for Davidson County
No. 20-0885-BC Anne C. Martin, Chancellor

No. M2021-00174-COA-R3-CV

Plaintiff appeals the trial court's decision to dismiss its class action allegations against two defendants on the basis of collateral estoppel. Specifically, the trial court ruled that while a prior determination that Appellant was not entitled to class action certification was not a final judgment on the merits, due to a dismissal of that case without prejudice, the ruling was "sufficiently firm" to have preclusive effect, citing the *Restatement (Second) Of Judgments*. Because Tennessee law requires a final adjudication on the merits for a judgment to be entitled to preclusive effect, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN and CARMA DENNIS MCGEE, JJ., joined.

Gregory S. Reynolds, Nashville, Tennessee, Gregory A. Brodek, Bangor, Maine, and Brad Thompson and Ryan Downton, Austin, Texas, for the appellant, Emergency Medical Care Facilities, P.C.

Gary C. Shockley, Caldwell G. Collins, and Paul T. Madden, Nashville, Tennessee, for the appellees, BlueCross BlueShield of Tennessee, Inc., and Volunteer State Health Plan, Inc.

Thomas H. Lee, Katharine B. Fischman, and Jeremey R. Goolsby Nashville, Tennessee, and Martin J. Bishop, Thomas C. Hardy, and Jason T. Mayer, Chicago, Illinois, for the Appellee, Amerigroup Tennessee, Inc.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This is the second iteration of this case and the third case involving related subject matter. In August 2014, Plaintiff/Appellant Emergency Medical Care Facilities, P.C. ("Appellant") filed its first action against Defendants/Appellees BlueCross BlueShield of Tennessee, Inc., and Volunteer State Health Plan, Inc. (collectively "Appellees") in the Madison County Circuit Court (hereinafter, "***EMCF I***"). Therein, Appellant alleged that Appellees breached their contract with Appellant in connection with rate reductions directed by the State of Tennessee's Division of TennCare ("TennCare"). Appellant sought to prosecute its case as a class action.

Eventually, the Madison County Circuit Court denied Appellant's request for class certification. Appellant appealed to this Court pursuant to Tennessee Code Annotated section 27-1-125. The Court of Appeals affirmed the denial of class certification in an opinion filed on November 29, 2018. *See* ***Emergency Med. Care Facilities P.C. v. BlueCross BlueShield of Tenn. Inc.***, No. W2017-02211-COA-R3-CV, 2018 WL 6266529 (Tenn. Ct. App. Nov. 29, 2018). Appellant chose not to appeal the decision of the Court of Appeals to the Tennessee Supreme Court. The case was therefore remanded back to the Madison County Circuit Court, where the proceedings resumed.[1]

Appellees moved for summary judgment on remand. In response, Appellant filed a motion to voluntarily dismiss ***EMCF I*** without prejudice. *See* Tenn. R. Civ. P. 41.01. Appellees objected on the basis of the pending summary judgment motion. *See* ***id.*** ("[E]xcept 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 order of September 10, 2019, the Madison County Circuit Court granted Appellant's motion to dismiss without prejudice. Therein, the court stated that it was exercising its discretion to allow a dismissal without prejudice because the dismissal would not deprive Appellees of a vested right, nor had Appellees shown that they would suffer "plain legal prejudice" as a result of the dismissal without prejudice. No appeal was taken from this order.

During the pendency of ***EMCF I***, another case involving the rate reduction was winding its way through our courts. Specifically, in 2018, Appellant filed a declaratory judgment against TennCare over its implementation of a $50.00 triage fee (hereinafter, "***EMCF II***") in Davidson County Chancery Court ("the chancery court" or "the trial court"). On September 1, 2020, the chancery court ruled that the rate change violated the Tennessee Uniform Administrative Procedure Act's ("UAPA") rule-making procedures. TennCare appealed to this Court.

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[1] Under section 27-1-125, the proceedings in the Madison County Circuit Court were "automatically stayed pending the appeal of the class certification ruling."

In the meantime, Appellant refiled its initial action in the trial court against Appellees on September 8, 2020 (hereinafter "***EMCF III***" or "instant action"), relying on the saving statute.[2] *See* Tenn. Code Ann. § 28-1-105 ("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, . . . the plaintiff . . . may, from time to time, commence a new action within one (1) year after the reversal or arrest."). Appellant once again sought to certify a class of similarly situated providers against Appellees and also against a new Defendant, Amerigroup Tennessee, Inc. ("Amerigroup").[3] But Appellees filed a motion on October 19, 2020, to dismiss and strike the class action allegations against them on the basis of collateral estoppel and law of the case. Specifically, Appellees argued that the Court of Appeals' decision in ***EMCF I*** precluded Appellant from relitigating the issue of class action certification. Appellant responded that the issues in ***EMCF I*** and ***EMCF III*** were not identical due to a change in the legal landscape of the action caused by ***EMCF II*** and that ***EMCF I*** was not a final decision on the merits subject to preclusive effect.

On February 9, 2021, the trial court granted Appellees' motion to strike on the basis that Appellant was collaterally estopped from relitigating the class action allegations against Appellees. In reaching this result, the trial court first ruled that the invalidation of the $50.00 cap by the trial court in ***EMCF II*** was not an intervening change in circumstances sufficient to avoid collateral estoppel. The trial court also disagreed that Appellant could avoid collateral estoppel on the basis that the decision in ***EMCF I*** was not final and on the merits. Rather, the trial court adopted Section 13 of the *Restatement (Second) Of Judgments* (1982), which provides that a non-final judgment may be preclusive when the decision is "sufficiently firm to be accorded conclusive effect." The trial court did not, however, rule that the law of the case doctrine was applicable.[4] Appellant timely appealed once again to this Court under section 27-1-125.

While the instant appeal was pending, this Court issued its opinion in ***EMCF II***, reversing the chancery court and holding that the reimbursement cap was not subject to the UAPA's rule-making requirements. *See* ***Emergency Med. Care Facilities, P.C. v. Div. of TennCare***, No. M2020-01358-COA-R3-CV, 2021 WL 4641485 (Tenn. Ct. App. Oct. 7, 2021), *perm. app. granted* (Tenn. Apr. 14, 2022), *rev'd,* No. M2020-01358-SC-R11-CV, 2023 WL 3639482 (Tenn. May 25, 2023). TennCare promptly appealed to the Tennessee Supreme Court, and we stayed this appeal pending resolution of that appeal. On May 25, 2023, the Tennessee Supreme Court reversed the Court of Appeals and reinstated the chancery court's judgment, holding that the cap was subject to the UAPA's rule-making

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[2] By order of the Tennessee Supreme Court, ***EMCF III*** was transferred to the Business Court Pilot Project of the trial court.

[3] Amerigroup participated in this appeal only minimally, as the ruling on appeal relates to the preclusive effect of ***EMCF I***. Amerigroup was not a party to ***EMCF I***, and the trial court's ruling in the instant appeal did not apply to the claims against it.

[4] Appellees do not appear to take issue with this decision on appeal.

requirements. *See* ***Emergency Med. Care Facilities, P.C. v. Div. of TennCare***, No. M2020-01358-SC-R11-CV, -- S.W.2d --, 2023 WL 3639482 (Tenn. May 25, 2023). A final decision having been rendered in ***EMCF II***, this appeal may now proceed.

II. ISSUES PRESENTED

Appellant raises three issues in this appeal, which are taken from its brief:

1. Did the Chancery Court err in holding that collateral estoppel bars [Appellant] from seeking to certify a class with respect to its claims against [Appellees], when the essential circumstances underpinning the decision to deny class certification in the prior case dramatically changed with the intervening invalidation of the $50 Cap?
2. Did the Chancery Court err in holding that collateral estoppel applies to "sufficiently firm" procedural rulings in a case that is voluntarily dismissed without prejudice before any adjudication on the merits occurred, instead of adhering to the Tennessee Supreme Court's clear requirement that collateral estoppel can apply only if the prior judgment concludes the rights of the parties on the merits?
3. Even if this Court agrees that the amorphous "sufficiently firm" standard should supplant the long-standing "final judgment" requirement of Tennessee law, did the Chancery Court err in applying that change in law retroactively to the prejudice of [Appellant]?

III. STANDARD OF REVIEW

In this case, the trial court dismissed Appellant's class action allegations against Appellees on the basis of collateral estoppel. "[W]hether collateral estoppel applies is a question of law." ***Mullins v. State***, 294 S.W.3d 529, 535 (Tenn. 2009). "We review a trial court's legal conclusions de novo, with no presumption of correctness." ***In re Bridgestone/Firestone***, 495 S.W.3d 257, 266 (Tenn. Ct. App. 2015) (citing ***Doe v. Sundquist***, 2 S.W.3d 919, 922 (Tenn. 1999)). The same standard applies when we review a trial court's decision to grant a motion to dismiss. *See* ***Myers v. AMISUB (SFH), Inc.***, 382 S.W.3d 300, 308 (Tenn. 2012).

III. ANALYSIS

Central to the dispute in this case is the doctrine of collateral estoppel. *See* ***Mullins***, 294 S.W.3d at 534. Collateral estoppel, or *issue* preclusion, is an extension of the doctrine of res judicata, also known as *claim* preclusion. ***State v. Thompson***, 285 S.W.3d 840, 848 (Tenn. 2009). The differences between the two doctrines are nuanced:

> The doctrine of res judicata bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit. Collateral estoppel operates to bar a second suit between the same parties and their privies on a different cause of action only as to issues which were actually litigated and determined in the former suit.

Id. (citing ***Massengill v. Scott,*** 738 S.W.2d 629, 631 (Tenn. 1987)). The parties to this appeal appear to agree that this case involves only the application of collateral estoppel, rather than res judicata.

To prevail on a claim of collateral estoppel, the party seeking issue preclusion has the burden of proving the following elements:

> (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Id. at 535. Even when these elements are met, however, exceptions may be present that allows the claimant to avoid collateral estoppel. *See generally* ***In re Bridgestone/Firestone***, 495 S.W.3d at 269–71. Both parties agree that Tennessee has adopted an exception where "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws[.]" ***Id.*** at 270 (quoting *Restatement (Second) of Judgments* § 28 (1982)).

Appellant's primary argument in this appeal is two-fold. First, it argues that the above exception applies due to the invalidation of the $50.00 cap in ***EMCF II*** following the appellate decision in ***EMCF I***. Second, it argues that the denial of class action certification in ***EMCF I*** is not entitled to preclusive effect because it was not a final adjudication on the merits and the trial court was wrong to adopt the "sufficiently firm" rule because it violates Tennessee law. Because we conclude that it is dispositive of this appeal, we address Appellant's second argument first.

In order for a judgment to be given preclusive effect, it generally must be a final judgment on the merits: "Application of either res judicata or collateral estoppel requires a prior final judgment on the merits." ***Wolf v. Summitt***, No. E2006-00407-COA-R3-CV, 2006 WL 2805163, at *2 (Tenn. Ct. App. Oct. 2, 2006) (citing ***Goeke v. Woods***, 777 S.W.2d 347, 349 (Tenn. 1989) (regarding res judicata); ***Beaty v. McGraw***, 15 S.W.3d 819,

824 (Tenn. Ct. App. 1998) (regarding collateral estoppel), *abrogated on other grounds by* ***Bowen ex rel. Doe v. Arnold***, 502 S.W.3d 102 (Tenn. 2016)). In other words, "[r]es judicata and collateral estoppel apply only if the prior judgment concludes the rights of the parties on the merits." ***Richardson v. Tenn. Bd. of Dentistry***, 913 S.W.2d 446, 459 (Tenn. 1995) (citing ***A.L. Kornman Co. v. Metro. Gov't of Nashville & Davidson Cnty.***, 216 Tenn. 205, 391 S.W.2d 633, 636 (Tenn. 1965)).

A nonsuit that results in a dismissal without prejudice does not, however, conclude the rights of the parties on the merits. Instead, a dismissal without prejudice specifically means that a claim is "**not** concluded upon its merits[.]" ***Clements v. Austin***, 673 S.W.2d 867, 870 (Tenn. Ct. App. 1983) (emphasis added); *see also* ***Cooter & Gell v. Hartmarx Corp.***, 496 U.S. 384, 396, 110 S. Ct. 2447, 2456, 110 L. Ed. 2d 359 (1990) ("'[D]ismissal . . . without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits,' and thus does not have a res judicata effect." (alterations in original) (citation omitted) (construing language of Fed. R. Civ. P. 41(a))); Without Prejudice, *Black's Law Dictionary* (9th ed. 2009) ("Without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party[.]"). As aptly explained by one treatise on this subject:

> A judgment of nonsuit is not conclusive on the parties as to the issues which were or might have been involved in the action, unless it amounts to a judgment on the merits. Where a discontinuance is not based on a special agreement, the termination of an action by a discontinuance is not conclusive on the parties or their attorneys of the merits of the rights involved in the controversy.

50 C.J.S. *Judgments* § 1053.

The Tennessee Supreme Court has previously described a nonsuit without prejudice as non-final when later used to prevent re-litigation in a later case:

> We think, on principle and authority, a nonsuit decides nothing, but leaves the parties as they began their litigation,—at arm's length. "Under no circumstances," says Mr. Freeman in his work on Judgments (volume 1, § 266), "will a judgment on nonsuit be deemed final." Leaving the controversy indeterminate between the parties, it not only cannot support the plea of res adjudicata, but the reasoning and opinion of the court in reversing cannot have the effect of binding in subsequent litigation as the "law of the case." ***Fisk v. Parker***, 14 La. Ann. 491. It was with this view that this court, speaking through McAlister, J., in ***Hooper v. Railroad Co.***, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931, quoted approvingly from ***Gassman v. Jarvis (C. C.)***[,] 100 Fed. 146, as follows: "When a cause of action removed into a court of the United States is dismissed therefrom without a trial or determination

> of the merits, the right of action still remains in full force and vigor, unaffected thereby; and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought."

Illinois Cent. R. Co. v. Bentz, 108 Tenn. 670, 69 S.W. 317, 319 (Tenn. 1902); *see also* ***Rankhorn v. Sealtest Foods***, 63 Tenn. App. 714, 721, 479 S.W.2d 649, 652 (Tenn. Ct. App. 1971) ("The plaintiff's dismissal by voluntary nonsuit . . . did not extinguish her cause of action . . . or confer upon [the defendant] any affirmative substantive right to prevent a recovery against him . . . but, the dismissal merely produced the same effect as if the [defendant] had never been sued by plaintiff."). As a result, "[a] judgment dismissing an action 'without prejudice' is not conclusive as to any issues joined, and does not constitute either res judicata or collateral estoppel." 50 C.J.S. *Judgments* § 1054 (footnotes omitted); *see also* 149 A.L.R. 553 ("[N]umerous cases have settled the rule that as a general proposition a judgment which by its terms purports to be 'without prejudice' does not operate as res judicata.").

Here, there can be no real dispute that Appellant's class action allegations were denied on their merits. But there can also be no genuine dispute that the judgment denying class action certification in ***EMCF I*** was initially interlocutory. *See* ***Emergency Med. Care Facilities***, 2018 WL 6266529, at *2 (Tenn. Ct. App. Nov. 29, 2018) (describing the appeal under section 27-1-125 as interlocutory); ***Highlands Physicians, Inc. v. Wellmont Health Sys.***, No. E2017-01549-COA-R3-CV, 2017 WL 6623992 (Tenn. Ct. App. Dec. 28, 2017) (same), *aff'd in part, vacated in part, remanded* (Mar. 14, 2018). Once a final judgment is entered, interlocutory orders become part and parcel of the final judgment. *See* ***Fox v. Fox***, 657 S.W.2d 747, 749 (Tenn. 1983) (noting that an interlocutory order is non-final until "the entry of judgment adjudicating all the claims and rights and liabilities of all parties").

The case of ***Frank Rudy Heirs Assocs. v. Sholodge, Inc.***, makes clear, however, that when a case is concluded via nonsuit without prejudice, the interlocutory orders entered during the pendency of the case do not become final binding orders, but must also be dismissed and have no binding effect. 967 S.W.2d 810 (Tenn. Ct. App. 1997). In ***Frank Rudy Heirs***, during a jury trial, the trial court made an oral ruling that essentially dismissed one of the plaintiff's claims. ***Id.*** at 812. No written order was entered to that effect, however, and the plaintiff later took a voluntary nonsuit of the case. ***Id.*** The case was then refiled, and the trial court eventually ruled in favor of the plaintiff. ***Id.*** at 813.

On appeal, the defendant argued that the plaintiff was "precluded from raising the same claim that was dismissed in the original suit[.]" ***Id.*** The Court of Appeals disagreed. First, it noted that even if an oral ruling was considered a valid order, "the parties are still left with an interlocutory order subject to revision at any time prior to 'entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.'" ***Id.*** (quoting Tenn. R. Civ. P. 54.02). As we explained:

> Even if we could give the chancellor's oral pronouncement from the bench the dignity of an order, it would be only an interlocutory order and, for *res judicata* or collateral estoppel to apply, the judgment in the prior case must have been final. *See* ***Richardson v. Tennessee Bd. of Dentistry***, 913 S.W.2d 446 (Tenn. 1995). A voluntary nonsuit is not an adjudication of "all the claims and the rights and liabilities of all the parties." Tenn. R. Civ. P. 54.02. Thus, upon dismissal, any interlocutory orders are merely part of the proceedings dismissed and have no binding effect.

Frank Rudy Heirs, 967 S.W.2d at 813; *see also* ***Richardson***, 913 S.W.2d at 459 (requiring a final conclusion of the rights of the parties for both res judicata and collateral estoppel). Thus, ***Frank Rudy Heirs*** makes clear that when a case is nonsuited, the prior interlocutory orders of the court, like the case as a whole, are dismissed and non-binding in future litigation. *See also* ***Bentz***, 69 S.W. at 319 (holding that "a nonsuit decides nothing").

The trial court apparently recognized that under Tennessee's traditional jurisprudence, Appellees could not demonstrate that ***EMCF I*** involved a final adjudication on the merits subject to preclusive effect due to the dismissal without prejudice of ***EMCF I***. Instead, the trial court ruled that Tennessee's finality rule should be relaxed in the context of collateral estoppel in accordance with the *Restatement (Second) of Judgments* § 13 (1982). Under this rule, "for purposes of issue preclusion . . . , 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." ***Id.*** The rationale for this laxity was explained as follows:

> The requirement of finality of judgment is interpreted strictly . . . when bar or merger is at stake. . . . But to hold invariably that that kind of carry-over is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship—either needless duplication of effort and expense in the second action to decide the same issue, or, alternatively, postponement of decision of the issue in the second action for a possibly lengthy period of time until the first action has gone to a complete finish. In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment. . . . Before doing so, the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion. The test of finality,

however, is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision.

Id. at § 13(g).

Numerous courts have applied the "sufficiently firm" rule in the context of collateral estoppel. *See, e.g.*, ***Greenleaf v. Garlock, Inc.***, 174 F.3d 352, 359 (3d Cir. 1999); ***Germain Real Est. Co. v. HCH Toyota, LLC***, 778 F.3d 692, 696 (8th Cir. 2015) (holding that Arkansas would apply the "sufficiently firm" rule); ***Borg-Warner Corp. v. Avco Corp. (Lycoming Div.)***, 850 P.2d 628, 635 (Alaska 1993); ***Carpenter v. Young By & Through Young***, 773 P.2d 561, 568 (Colo. 1989); ***Bryan v. State Farm Mut. Auto. Ins.***, 205 Md. App. 587, 605, 45 A.3d 936, 947 (Md. Ct. App. 2012); ***Baltrusch v. Baltrusch***, 2006 MT 51, ¶ 23, 331 Mont. 281, 293, 130 P.3d 1267, 1276; ***Kirsch v. Traber***, 134 Nev. 163, 167, 414 P.3d 818, 821 (Nev. 2018); ***Cunningham v. State***, 61 Wash. App. 562, 567, 811 P.2d 225, 228 (Wash. Ct. App. 1991). This is true even where the first action was dismissed without prejudice. *See, e.g.*, ***Robinette v. Jones***, 476 F.3d 585, 589 (8th Cir. 2007); ***Colvin v. Howard Univ.***, 257 A.3d 474, 482 (D.C. 2021) ("Unlike with claim preclusion, whether a dismissal has issue-preclusive effects does not depend on if it was with prejudice."), *cert. denied,* 212 L. Ed. 2d 589, 142 S. Ct. 1688 (2022); ***Rodriguez v. Dep't of Corr.***, 136 Idaho 90, 94, 29 P.3d 401, 405 (Iowa 2001). It appears, however, that some courts have so far declined to relax the requirement of finality in order for collateral estoppel to apply. *See, e.g.*, ***Armellini Express Lines, Inc. v. Sexton***, 384 So.2d 310 (Fla. Ct. App. 1980) (declining to give an order preclusive effect when the prior case was voluntarily dismissed prior to the entry of final judgment); ***Se. Illinois Elec. Co-op., Inc. v. Illinois Hum. Rts. Comm'n***, 162 Ill. App. 3d 806, 811, 516 N.E.2d 825, 828 (Ill. 1987) (appearing to reject the "sufficiently firm" standard argued by the dissent); ***State v. Beezley***, 752 S.W.2d 915, 917 (Mo. Ct. App. 1988) (declining to hold that a pre-trial ruling suppressing evidence was entitled to preclusive effect despite the dissent's argument that the ruling was "sufficiently firm").

The trial court cited three central reasons supporting its decision to apply the "sufficiently firm" rule. First, that the cases cited by Appellant involved claim preclusion, rather than issue preclusion. Second, that the cases cited by Appellant were decided prior to the enactment of Tennessee Code Annotated section 27-1-125. And, finally, that the Tennessee Supreme Court has previously cited the *Restatement (Second) of Judgments* favorably.

It is true that many of the cases relied upon by Appellant discuss res judicata rather than collateral estoppel. However, the Tennessee Supreme Court has made clear that "[a] final judgment is essential under *either* collateral estoppel or res judicata." ***Thompson,*** 285 S.W.3d at 848 (citing ***Richardson***, 913 S.W.2d at 459) (emphasis added). Thus, this necessary element is the same under either form of preclusion such that consideration of cases involving either doctrine is instructive on this question.

We also cannot discern how the enactment of section 27-1-125 changes the legal landscape of collateral estoppel or preclusion in general. To be sure, section 27-1-125 provides a mechanism by which decisions regarding class certification may be immediately appealed. It is at least arguable that following an appellate decision on class certification under this statute, the ruling regarding class certification would meet the "sufficiently firm" standard under section 13. But the statute does not alter the fact that the case is ongoing and the ruling on class certification is interlocutory in nature. In Tennessee, the general rule is that a judgment is not final if it "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties[.]" Tenn. R. App. P. 3(a). Clearly, the grant or denial of class action status does not meet this requirement.

Some interlocutory orders, however, may be rendered final in the absence of Rule 3's requirements. For example, under Rule 24.05 of the Tennessee Rules of Civil Procedure, "[a]ny order granting or denying a motion to intervene filed pursuant to this rule shall be a final judgment for purposes of [Rule] 3." Rule 54.02 of the Tennessee Rules of Civil Procedure also provides that some otherwise interlocutory orders may be designated as final for purposes of an immediate appeal. Section 27-1-125 contains no such language rendering an order regarding class certification final.

Likewise, appeals of class action certifications do not share other hallmarks of Rule 3 appeals such that we are persuaded that this statute altered the legal landscape regarding issue preclusion. For example, even other statutes that allow an immediate appeal without explicitly stating that the order appealed constitutes a final judgment indicate that the method of appeal is at least similar to appeals of final judgments under Rule 3. *See* Tenn. Code Ann. § 29-5-329 (formerly 29-5-319) (stating that an appeal of certain orders relating to arbitration "shall be taken in the manner and to the same extent as from orders or judgments in a civil action"). Section 27-1-125, however, shortens the time allowed by Rule 3 applicable to other judgments from thirty days to ten days. Tenn. Code Ann. § 27-1-125 (requiring a notice be filed "within ten (10) days after entry of the order"). Thus, nothing in section 27-1-125 indicates that the legislature intended this two-sentence statute to render an otherwise non-final order final for purposes of issue or claim preclusion or to change Tennessee's well-settled legal framework concerning final judgments.

Finally, we note that the trial court places too much emphasis on our supreme court's reliance on the *Restatement (Second) of Judgments* in this context. It is true that the Tennessee Supreme Court has relied on the *Restatement (Second) of Judgments* in multiple cases. *See* ***Bowen ex rel. Doe v. Arnold***, 502 S.W.3d 102, 116 (Tenn. 2016) (adopting sections 28, 29, and 85 of the *Restatement (Second) of Judgments* regarding non-mutual collateral estoppel); ***Mullins v. State***, 294 S.W.3d 529, 535 (Tenn. 2009) (adopting general rules regarding collateral estoppel found in sections 27, 29, and 87); *see also* ***In re Bridgestone/Firestone***, 495 S.W.3d at 270 (adopting an exception to collateral estoppel under section 28). What the trial court does not mention, however, is that the single time

that the Tennessee Supreme Court considered section 13 of the *Restatement (Second) of Judgments*, it expressly declined to relax our finality rule unlike the majority of other jurisdictions that had considered the issue. Specifically, in ***Creech v. Addington***, the Tennessee Supreme Court held that "[t]he rule in Tennessee may well be that a 'judgment is not final and *res judicata* where an appeal is pending.'" 281 S.W.3d 363, 377 (Tenn. 2009) (quoting ***McBurney v. Aldrich***, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991)); *see also* ***Freeman v. Marco Transp. Co.***, 27 S.W.3d 909, 913 (Tenn. 2000) (relying on ***McBurney***). Our high court maintained this rule despite the fact that it "places Tennessee in the minority of jurisdictions" as "[t]he federal courts and the majority of states" have adopted the "better view" espoused by the *Restatement (Second) of Judgments* section 13. ***Creech***, 281 S.W.3d at 377 n.17. Thus, when the Tennessee Supreme Court had an opportunity to relax our finality rules in favor of the majority rule espoused by section 13, it declined to do so. Respectfully, ***Creech*** is therefore far more instructive on whether the "sufficiently firm" standard should be adopted in Tennessee than either ***Arnold*** or ***Mullins***.

Moreover, the central rationale behind delaying the preclusive effect of an order until appeals are exhausted appears to stem from the danger that an order could be reversed on appeal. *See* ***Campbell v. Lake Hallowell Homeowners Ass'n***, 157 Md. App. 504, 524, 852 A.2d 1029, 1040 (Md. Ct. App. 2004) (noting "the manifest risks of resting preclusion on a judgment that is being appealed") (quoting Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 18A *Federal Practice and Procedure* § 4433, at 94 (2d ed. 2002)). Of course, that is exactly the same danger posed by an interlocutory order granting class certification that is subject to revision at anytime prior to a final judgment on the merits. *See* Tenn. R. Civ. P. 23.01, *adv. comm. cmt.* (as amended in 2005) (explaining that the class action "determination is subject to alteration at any time prior to judgment on the merits.");[5] *see also* ***Cobble v. Greene Cnty.***, No. E2018-02017-COA-R3-CV, 2019 WL 3450930, at *4 (Tenn. Ct. App. July 31, 2019) ("While the Advisory Commission Comments are not binding, they are compellingly persuasive." (quoting ***McCollum v. City of Friendsville***, No. 03A01-9505-CV-000158, 1995 WL 635750, at *5 (Tenn. Ct. App. Oct. 31, 1995))). And in this case, the effect of the dismissal without prejudice is that no final judgment on the merits has ever been rendered.[6] So the same rationale that prevents preclusion based on

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[5] Although this comment was adopted years before the 2011 enactment of the appeal-as-of-right procedure now contained in section 27-1-125, it has not been amended since the statute's enactment over ten years ago. *See* 2011 Tenn. Laws Pub. Ch. 510 (H.B. 2008). Even without the comment, however, the mere fact that an order on class action certification is interlocutory in nature supports the Advisory Committee's interpretation, where, as we previously discussed, the defining feature of an interlocutory order is that it may be revised at any time prior to final judgment. *See* ***Stidham v. Fickle Heirs***, 643 S.W.2d 324, 328 (Tenn. 1982) ("An interlocutory decree which adjudicates one or more but fewer than all of the claims or parties, can be revised at any time before entry of final judgment.").

[6] Of course, the law of the case doctrine would have prevented the circuit court in ***EMCF I*** from altering the decision of the Court of Appeals. *See* ***In re Est. of Boote***, 265 S.W.3d 402, 413 (Tenn. Ct. App. 2007) ("When the law of the case doctrine applies, the ruling of an appellate court becomes the law of the case and is binding in later trials and appeals of the same case if the facts in the second trial are substantially the same as the facts in the first trial or appeal."). But as the trial court found, the law of the case doctrine

orders that are pending appeal applies to interlocutory orders issued in a case that was later dismissed without prejudice.

In sum, Tennessee has generally required a final judgment concluding the rights of the parties on the merits for collateral estoppel to apply. A dismissal without prejudice following a nonsuit, however, does not constitute such a final judgment under our established jurisprudence. Appellees, however, ask this Court to soften Tennessee's traditional concepts of finality by adopting the majority rule in the *Restatement (Second) of Judgments*, allowing issue preclusion even where the first action was dismissed without prejudice following a nonsuit. In the past, however, the Tennessee Supreme Court has declined to relax our traditional notions of finality despite our rules conflicting with those adopted by the majority of jurisdictions. We therefore decline to do so now.

Here, Appellant was allowed to take a nonsuit of his entire action, resulting in a dismissal without prejudice. It then refiled this action as it was entitled to do under the saving statute. The saving statute, of course, is to be given a broad and liberal construction in order to achieve its goal of resolving disputes on their merits. ***Henley v. Cobb***, 916 S.W.2d 915, 916 (Tenn. 1996). Coupled with the application of the saving statute, a dismissal without prejudice essentially leaves the plaintiff to fight another day. *See* ***Oxford v. Williams Companies, Inc.***, 154 F. Supp. 2d 942, 952 (E.D. Tex. 2001) ("Presumably, a dismissal without prejudice would permit them to fight another day, in this court or another."). Appellant simply exercised the opportunity afforded to it under the saving statute. While this procedure may result in an increase in expenses as the parties relitigate the issue of class certification, Tennessee law provides Appellant with this second bite at the apple. The trial court's decision to strike and dismiss the class action allegations is therefore reversed. All other issues are pretermitted.

V. CONCLUSION

The judgment of the Davidson County Chancery Court is reversed, and this cause is remanded for further proceedings in accordance with this Opinion. Costs of this appeal are taxed to Appellees, BlueCross BlueShield of Tennessee, Inc., and Volunteer State Health Plan, Inc., for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE

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is not applicable here because this is a different case than ***EMCF I***.