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Guy M. Hicks
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July 21, 1999

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: *BellSouth Telecommunications, Inc.'s Tariff for Implementation of Intrastate Directory Assistance Charges*
Docket No. 99-00391

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to Request for More Definite and Detailed Statement. Copies are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

171449

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc.'s Tariff for Implementation of Intrastate Directory Assistance Charges*

Docket No. 99-00391

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO REQUEST FOR MORE DEFINITE AND DETAILED STATEMENT

For the third time in four weeks, the Consumer Advocate Division has filed a pleading seeking to delay BellSouth's implementation of a lawful Directory Assistance tariff. The CAD's Request for More Definite and Detailed Statement ("CAD's Request") raises legal issues that have already been decided against the CAD, relies on a 1995 proposed agreement that never became effective, and seeks clarification of a perfectly clear Preliminary Conference Agenda. As explained below, the TRA should deny the CAD's Request in its entirety, deny the CAD's Petition for Declaratory Order; Complaint and Petition for Injunctive Relief ("CAD's Petition") in its entirety, and approve BellSouth's Directory Assistance Tariff at the July 27, 1999 Conference.

I. There Are No Genuine Issues of Material Fact Regarding BellSouth's Directory Assistance Tariff.

The Tennessee Supreme Court has explained that "material facts" are those "that might affect the outcome of the suit under the governing law." *Byrd v. Hall*, 847 S.W.2d 208, 212 (Tenn. 1993). Thus "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.* The Supreme Court has also explained that the term "disputed facts" refers only to "disputed, material facts and does not include mere legal conclusions to be drawn from those facts." *Id.* at 215. In light of these standards, it is clear that the CAD's assertion that "issues and disputes of material fact exist" is simply wrong. *See* CAD's Request at ¶¶ 8-9.

It is undisputed that BellSouth's tariffs, the various TRA Orders referenced by the CAD and by BellSouth, the transcripts of proceedings before the PSC and the TRA, the 1995 proposed agreement relied upon by the CAD, correspondence between the CAD and BellSouth, and state statutes all say what they say. The only issues presented by the CAD's filings involve the legal conclusions to be drawn from these undisputed facts. As explained below, applying the applicable law to these undisputed facts reveals that BellSouth's Directory Assistance tariff is lawful and should be approved.

A. As a matter of law, the 1995 proposed agreement is not binding upon the CAD, BellSouth, or any other person or entity because neither the PSC nor the TRA approved the proposed agreement.

The CAD's desperate reliance on the proposed agreement submitted to the PSC in 1995 for consideration in Docket No. 94-02876[1] ("the proposed agreement") is misplaced. *See* CAD's Request at ¶¶ 5-6. The proposed agreement clearly was contingent upon approval by the PSC, and neither the PSC nor the TRA approved the agreement. *See* BellSouth's Response to CAD's Petition ("BellSouth's Response") at 6-9. The proposed agreement, therefore, binds neither the CAD nor BellSouth because an agreement that is contingent upon court (or agency) approval is not valid and binding on the parties unless and until the court (or agency) actually approves it. *See Oakley v. Oakley,* 686 S.W.2d 85 (Tenn. Ct. App. 1984).

In *Oakley*, the wife filed for divorce and entered into a written property settlement agreement with her husband, which was expressly subject to court approval. Before the court approved this agreement, the husband died. During the ensuing probate proceedings, the wife claimed to be the husband's "surviving spouse," and the husband's family opposed this claim,

[1] This is the docket the PSC convened to address the directory assistance tariff South Central Bell filed in 1994.

citing Tennessee statutes which provide that a person who is a party to a valid property settlement agreement is not a surviving spouse. Even though both the husband and the wife had signed the agreement, the Court of Appeals held that the wife was not bound by the agreement, stating:

> In its ordinary common sense, the word "valid" means "of binding force, sustainable and effective in law." It cannot be said that the Property Settlement Agreement between the parties was "binding," since by the express language contained therein its validity was made contingent upon the approval of the court. Therefore, there could be no "valid" Property Settlement Agreement until such time as the Law and Equity Court of Gibson County approved it.

Oakley, 686 S.W.2d at 87.[2]

Similarly, the 1995 proposed agreement was conditioned upon the PSC's approval of the agreement. Because neither the PSC nor the TRA approved it, the 1995 proposed agreement is not valid so as to bind either the CAD or BellSouth. Accordingly, the 1995 proposed agreement has no bearing whatsoever on BellSouth's directory assistance tariff.

B. As a matter of law, the 1995 proposed settlement agreement did not survive the TRA's dismissal of Docket No. 94-02876 without prejudice.

Although the CAD correctly notes that the TRA dismissed Docket No. 94-02876 without prejudice, *see* CAD's Reply at 6, the CAD is simply wrong when it claims that the 1995 proposed agreement somehow survived the dismissal of that docket. As explained below, agreements between parties do not survive the dismissal of an action without prejudice absent

[2] The CAD is fully aware of the *Oakley* decision -- it even quotes the language cited above in the Reply it filed with the TRA on June 25, 1999. *See* CAD's Reply at 3. Yet in the same document in which it endorses this controlling rule of law, the CAD inexplicably argues that the 1995 proposed agreement binds BellSouth even though it has never been approved by the PSC or the TRA, and even though the docket in which the agreement was proposed has been dismissed. Significantly, the CAD does not -- and cannot -- argue that its position can be reconciled with the *Oakley* decision.

"explicit conditions to the contrary" in the dismissal order. *See Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990). Thus even if the 1995 proposed agreement somehow had become binding upon the CAD and BellSouth (which it did not), the CAD's failure to request "explicit conditions to the contrary" upon the dismissal of Docket No. 94-02876 without prejudice would have been the death knell of the 1995 proposed agreement.

In *Sandstrom*, the plaintiff pursued its lawsuit against the defendant in the State of Maine for more than a year before voluntarily dismissing the action without prejudice. When the plaintiff re-filed the action in Maine, the defendant claimed that the Maine courts lacked personal jurisdiction over it. The plaintiff claimed that the defendant had agreed not to contest personal jurisdiction in Maine during the first action and argued that this agreement prohibited the defendant from contesting personal jurisdiction in the second action. The court rejected the plaintiff's claim, explaining that

> any such commitment [during the first action] would be irrelevant to the situation in [the second action]. Absent explicit conditions to the contrary -- and there were none here -- a [voluntary dismissal without prejudice] wipes the slate clean, making any future lawsuit based on the same claim an entirely new lawsuit unrelated to the earlier (dismissed) action. Agreements do not automatically survive from one suit to the next.

Sandstrom, 904 F.2d at 86. The court concluded that once an action has been dismissed without prejudice,

> all markings are erased and the page is once again pristine. It follows inexorably that, in filing [the second action], plaintiff could not exhume any alleged jurisdictional consent in [the first action] for the purpose of establishing jurisdiction in [the second action]. The two cases were separate and independent, and had to be treated in that manner.

Id. at 87. Both state and federal courts in Tennessee adhere to the same rule. *See Price v. Boyle Investment Co.*, 1990 WL 60659 at *4 (Tenn. Ct. App. May 11, 1990) (copy attached) ("A dismissal without prejudice . . . leaves the parties where they would have stood had the lawsuit

never been brought."); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1247 (6th Cir.) *cert. denied* 510 U.S. 818 (1993)("With regard to the waiver issue, [the defendant's] actions in the first suit are irrelevant because a voluntary dismissal without prejudice leaves the situation as if the action had never been filed.").

Although the CAD was a party to Docket No. 94-02876, it stood idly by as the docket was dismissed without prejudice pursuant to Administrative Order No. 1. *See* BellSouth's Response at 8. Had the CAD desired to preserve the terms of the 1995 proposed settlement agreement, the CAD should have either opposed the dismissal of the docket or petitioned the TRA to approve the proposed agreement and to make the continued validity of the agreement a condition of the dismissal of the docket. Having chosen instead to embark on a course of "non-action," *see* CAD's reply at 5, the CAD may not now attempt to exhume the bones of an agreement that died long ago.

C. As a matter of law, directory assistance is a non-basic service, and BellSouth is operating under an approved price regulation plan.

Despite the CAD's refusal to accept the TRA's prior rulings, the fact remains that BellSouth is operating under an approved price regulation plan and that directory assistance is a non-basic service regardless of which incumbent local exchange telephone company provides the service. *See* BellSouth's Response at 3-6. No facts alleged by the CAD (as opposed to the erroneous legal conclusions the CAD tries to draw from those facts) alter the legal effect of these rulings.

II. No Evidentiary Hearing is Warranted, and the TRA Should Approve BellSouth's Tariff at the July 27, 1999 Conference.

The CAD claims that the TRA convened a contested case proceeding in this matter "when the agency directed BellSouth to respond [to the CAD's petition] . . . ." Reply at 1. Once

again, the CAD misunderstands the controlling law. In deciding a petition for a declaratory order, the TRA may either refuse to issue a declaratory order, or it may "convene a contested case hearing pursuant to the provisions of this chapter . . . ." T.C.A. §4-5-223 (emphasis added). Despite the CAD's contention to the contrary, the TRA has not convened a contested case hearing pursuant to the provisions of the Administrative Procedures Act.

As explained in BellSouth's Response, the TRA has the discretion to deny a complaint or other request for relief without convening a contested case. BellSouth's Response at 4. Regardless of whether the TRA ultimately decides to convene a contested case, however, the TRA's Rules and Regulations of Practice and Procedure require BellSouth to file a responsive pleading to a complaint within 20 days. *See* Rule 1220-1-1-.11. Even when BellSouth files a responsive pleading pursuant to this rule, however, the TRA may still decide not to convene a contested case proceeding. *See, e.g., Consumer Advocate Div. v. Greer*, 967 S.W.2d 759 (Tenn. 1998). The filing of a responsive pleading, therefore, clearly does not initiate a contested case proceeding.

Similarly, the TRA did not convene a contested case when it established an expedited deadline for BellSouth to file a responsive pleading and extended the CAD the courtesy of an opportunity to file a reply pleading. The schedule did not appoint a pre-hearing officer, set a pre-hearing conference, establish a discovery schedule, set a hearing date, or take any other action that is remotely indicative of convening a contested case proceeding. Accordingly, the TRA has not convened a contested case proceeding and, as explained in BellSouth's Response, there is no need for the TRA to do so.

III. The TRA Should Deny the CAD's Request for an Injunction.

The CAD asks the TRA to "enjoin said DA charge until the complaint against BellSouth Telecommunications is resolved on grounds of breach of contract." *See* CAD's Request at ¶ 5. An injunction, however, is an extraordinary and drastic remedy that never may be obtained as a matter of right. *Wright & Miller* § 2948; *Butts v. City of South Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977); *Hall v. Ballance*, 497 S.W.2d 409, 410 (Tenn. 1973); *Morrison v. Jones*, 430 S.W.2d 668, 673 (Tenn. Ct. App. 1968); *Hall v. Britton*, 292 S.W.2d 524, 531 (Tenn. Ct. App. 1953). Instead, the party requesting an injunction bears the burden of proving, among other things, that it has a substantial likelihood of success on the merits. As BellSouth has already demonstrated, the CAD cannot make this necessary showing with regard to its breach of contract allegations.

Additionally, an injunction is not an appropriate remedy when the party seeking the injunction has an adequate alternate remedy in the form of money damages. *Fort v. Dixie Oil Co.*, 95 S.W.2d 931, 932 (Tenn. 1936). The CAD acknowledges that its request for an injunction is premised on its complaint alleging "breach of contract," *see* Request at ¶ 5, and the award of money damages is an adequate remedy for any breach of contract alleged by the CAD. *See Williamson County Broadcasting Co. v. Intermedia Partners*, 987 S.W.2d 550, 554 (Tenn. Ct. App. 1998) (holding that money damages was an adequate remedy for alleged breach of contract because "[a]fter all, this whole dispute is about money, and damages for the breach of a personal contract is generally an adequate remedy."). Consequently, even assuming the Authority had the power to award injunctive relief, such relief would not be proper here.

IV. The TRA Should Deny the CAD's Request for a More Definite Statement

Although the TRA's Preliminary Conference Agenda is not a "pleading to which a responsive pleading is permitted," *see* T.R.C.P. 12.07, the CAD has asked the TRA to "provide a more definite and detailed statement regarding the issues which it may consider with respect to Directory Assistance on July 27, 1999." CAD's Request at 2. The CAD made this unusual and unnecessary request without citing any authority permitting a party to seek a "more definite and detailed statement" from an agency.

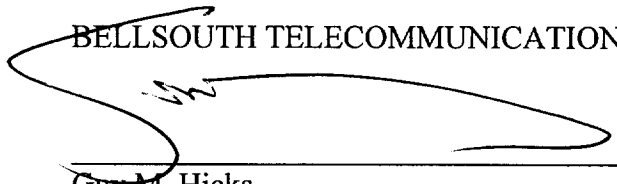
Even setting aside the procedural infirmities of the CAD's Request, the TRA should still deny the Request. The CAD is the only person or entity to raise any issues in this proceeding regarding BellSouth's Directory Assistance tariff, and it sets forth its issues in its Petition consisting of some forty-two paragraphs. For the CAD to now ask the TRA for a "more definite and detailed statement" of the issues it raised in its own pleading is meritless. Additionally, the TRA's Final Conference Agenda plainly indicates that the TRA will consider both the CAD's Petition and BellSouth's tariff during the July 27, 1999 Conference. Nothing further is required or warranted.

CONCLUSION

For the reasons explained above, the TRA should approve BellSouth's Directory Assistance Tariff as filed at its July 27, 1999 Conference and deny the CAD's "Request for More Definite and Detailed Statement."

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 1999, a copy of the foregoing document was served via the method indicated:

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SEE COURT OF APPEALS RULES 11 AND 12

Gloria Ann PRICE, Individually, Demetric Lamont Price, and Carlos Antrell Price, By Next Friend, Gloria Ann Price, Plaintiffs Below,
v.
BOYLE INVESTMENT COMPANY, Boyle Enterprises, Inc., Robert E. Horrell, Sr., and John Conrad, Defendants/Cross-Plaintiffs/ Appellants,
and
Harlan THOMAS, Defendant/Cross-Defendant/ Appellee.

Court of Appeals of Tennessee, Western Section at Jackson.

May 11, 1990.

Permission to Appeal Denied by Supreme Court June 11, 1990.

Hardeman Law, No. 1, Case Nos. 7468, 7538 and 7540, Jon Kerry Blackwood, Judge.

James W. McDonnell, Jr. and Thomas J. Walsh, Jr. of McDonnell, Boyd, Smith & Solmson, Memphis, for appellants.

Gary K. Smith of Shuttleworth, Smith & Webb of Memphis, for appellee.

TOMLIN, Presiding Judge, Western Section.

***1** This appeal from the Circuit Court for Hardeman County involves a lingering portion of multi-party litigation that arose out of the collapse of a shopping center roof in Bolivar, in July, 1983. Numerous suits for personal injuries and property damages resulted. Among them were three suits filed by Gloria Ann Price, et al against various defendants, including the two involved in this present appeal, namely, Boyle Investment Company (hereafter "Boyle") and Harlan Thomas (hereafter "Thomas"). This litigation stems from a crossclaim filed by Boyle against Thomas.

The original plaintiffs and most of the original defendants are no longer involved in this litigation. A detailed statement of the facts of this case and its procedural history up to the time of the prior appeal are found in an opinion of this Court written by Special Judge McLemore, styled Price v. Boyle Investment Co., 12 T.A.M. 38-7 (Aug. 17, 1987) appeal denied (Dec. 28, 1987). There were multiple cross-claims filed among various co-defendants in Price. Prior to the trial of the personal injury action, the trial court severed all cross-claims from the main trial.

In essence, Boyle's cross-claim against Thomas is one for indemnity. At the trial of the original litigation the jury found Thomas "not guilty" of negligence. This Court reversed as to Thomas, holding that the trial court should have submitted to the jury the question of whether or not Thomas was aware of the condition of the shopping center. Following remand, Thomas filed a motion for summary judgment as to Boyle's cross-claim against him. Boyle moved for and was granted the right to amend its cross-claim against Thomas to allege more specifically active negligence on the part of Thomas.

Subsequently, before Thomas' summary judgment motion was scheduled to be heard, Boyle moved for leave to take a voluntary nonsuit of its cross-claim. The trial court initially granted the motion, then reversed its decision and denied it. The trial court then granted Thomas' summary judgment motion as to Boyle's cross-claim.

By its appeal, Boyle presents two issues for our consideration: Did the trial court err (1) in denying Boyle's motion for leave to take a voluntary nonsuit on its cross-claim against Thomas; and (2) in granting summary judgment in favor of Thomas. We find no error and affirm.

The collapse of a portion of Thomas' shopping center during a rainstorm in 1983 resulted in injuries to Gloria Price and others. Price filed suit against Boyle and others aligned with Boyle, along with Thomas, alleging negligence in the construction of the shopping center. At the conclusion of the trial, judgment was entered for Price against Boyle and others, with Thomas being found "not guilty" of negligence. As noted, this Court reversed as to Thomas, remanding the case for a new trial. The case of the original plaintiffs against all defendants has been settled and disposed of. The issues presented by this appeal deal solely with the action of the trial court in denying Boyle's motion for a voluntary nonsuit and in granting Thomas' motion

for summary judgment.

I. THE VOLUNTARY NONSUIT ISSUE

***2** Rule 41 of the Tennessee Rules of Civil Procedure reads in pertinent part as follows:

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....

* * *

41.03 Dismissal of Counterclaim, Cross-Claim or Third-Party Claim

The provisions of this Rule 41 also apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

Following the remand to the trial court, Thomas filed a motion for summary judgment as to Boyle's counter-claim against him. In support of his motion, Thomas contended that inasmuch as Boyle was a general contractor on the job, any knowledge of construction defects on the part of Thomas could not be superior to the knowledge of Boyle and its employees. Thus, Boyle's negligence could not be passive.

A few months later, while Thomas' summary judgment motion was pending, before it was scheduled to be heard, Boyle filed a motion under Rule 41, T.R.C.P., for leave to take a voluntary nonsuit of its cross-action against Thomas in which the summary judgment motion was pending. Following a hearing, the trial court granted Boyle's application for a voluntary nonsuit, directing that the order to be prepared by counsel should state that "a Non-Suit would provide the proper predicate that would constitute a termination sufficient to support a cause of action for malicious prosecution."

Boyle's attorney prepared the order, but before it could be submitted to the trial court for consideration, this Court filed its opinion in Knoxville in the case of Millsaps v. Millsaps, 14 T.A.M. 24-7 (May 3, 1989). Millsaps is a malicious prosecution case. As to one of the defendants in Millsaps, the malicious prosecution complaint noted that the underlying suit had concluded with the plaintiff taking a nonsuit. The Millsaps court concluded that "the pleadings are sufficient to allege a cause of action for malicious prosecution." However, that sentence was footnoted as follows: "The briefs do not present the issue of whether a voluntary nonsuit constitutes a favorable termination of the ancillary proceeding." Based upon Millsaps, counsel for Thomas, by letter, asked the trial court to reconsider its action, asserting that the footnote inferred that if the issue had been raised, the Millsaps court would have found that a nonsuit is not a favorable termination to serve as a predicate for a malicious prosecution action.

Upon reconsideration, the trial court reversed its prior decision and denied Boyle's motion for a voluntary nonsuit. The order of nonsuit noted Thomas' assertion of his intent "to amend his cause of action in Harlan Thomas v. Boyle Investment Company, et al., No. 7539, to allege malicious prosecution." The trial court also held as follows:

***3** And the court being of the opinion that a voluntary nonsuit does not constitute a termination which will support a cause of action for malicious prosecution and the Court should, therefore, deny cross-plaintiffs' motion for leave to take a voluntary nonsuit.

It is implicit in Rule 41, T.R.C.P., that the trial court, in a case where a motion for summary judgment is pending, has authority to permit a voluntary dismissal notwithstanding the pendency of such a motion. Stewart v. University of Tennessee, 519 S.W.2d 591 (Tenn.1974). Furthermore, the right of a plaintiff to a voluntary nonsuit is further restricted to the extent that the granting of a nonsuit must not deprive a defendant of a right that became vested during the pendency of the suit. Anderson v. Smith, 521 S.W.2d 787 (Tenn.1975). In applying Rule 41 of the Federal Rules of Civil Procedure, which is strikingly similar to Rule 41.01, T.R.C.P., federal courts have held that a plaintiff is not entitled to a voluntary dismissal if as a result thereof the defendant will suffer a legal detriment. See Druid Hills Civic Ass'n, Inc. v. Federal Highway Administration, 833 F.2d 1545 (11th Cir.1987).

The general rule is that where the right to a voluntary dismissal is in the discretion of the trial court, it should be granted absent some showing of plain legal prejudice to the defendant. Schoolhouse Educational Aids, Inc. v. Haag, 145 Ariz. 87, 699 P.2d 1318 (1985); Caplinger v. Carter, 9 Kan.App.2d 287, 676 P.2d 1300 (1984). The possibility of one being subjected to a second lawsuit is insufficient legal prejudice. McCants v. Ford Motor Co., Inc., 781 F.2d 855 (11th Cir.1986).

In the case at bar, Thomas contended before the trial court, and now before this Court, that he desires and intends to amend the complaint to include a claim for malicious prosecution in a pending civil action in the Circuit Court in Hardeman County against Boyle. He contends, and the trial court found, that a voluntary nonsuit would not constitute a termination of the underlying suit favorable to Thomas; thus, he would have suffered a legal "prejudice."

The trial court cites no authority for the conclusion of law so stated, nor have we found any in this state directly on point. The closest case on point to the one under consideration is Anderson v. Smith, supra. We have already referred to the footnote in Millsaps. However, we do not feel that it is in any way determinative of this issue.

In looking to other jurisdictions we find a split of authority. In Zahorsky v. Barr, Glynn & Morris, P.C., 693 S.W.2d 839, 842 (Mo.App.1985), it was stated that:

The general rule is that a dismissal without prejudice does not terminate the case in favor of the defendant absent proof that the dismissal is coupled with the intent of the plaintiff to abandon the claim. This follows because a dismissal without prejudice does not alone conclude the cause with finality.

In C.N.C. Chemical Corp. v. Pennwalt Corp., 690 F.Supp. 139 (D.R.I.1988), the court found that the voluntary dismissal of a prior patent infringement action without prejudice was not "termination of the suit." Thus, it did not pose a resolution favorable to the manufacturer of the alleged infringing product, and did not support a malicious prosecution claim under Rhode Island law. The court said:

***4** In any event, whether or not the [voluntary] dismissal of the Pennsylvania suit is characterized as 'unsuccessful' for Pennwalt, it does not constitute a 'termination' upon which a claim of malicious prosecution may be based. The termination requirement is rooted in considerations of ripeness and judicial economy. It is based on the belief that a malicious prosecution claim should not be litigated when the suit underlying it might still be resolved by settlement or might result in a verdict for the Plaintiff, thereby negating the contention that it was brought without probable cause. Accordingly, a 'termination that permits the matter to be revived cannot serve as a foundation for the action.' See W. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser & Keeton on Torts § 119 at 874 (5th Ed.1984).

We concede that there are authorities to the contrary. One is Brown v. Carr, 503 A.2d 1241 (D.C.App.1986), cited by appellants in their brief. That case is readily distinguishable from the case at bar in that the trial court considered and then ruled that the underlying litigation had not been terminated in favor of plaintiff, and that plaintiff acquiesced in the courts making such a finding.

Another case to the contrary is that of Abbott v. United Venture Capital, Inc., 718 F.Supp. 828 (D.Nev.1989). In Abbott, the U.S. District Court for the District of Nevada was called upon to predict how the Nevada Supreme Court would resolve the issue of whether a voluntary dismissal without prejudice satisfied the favorable termination requirement of a malicious prosecution claim.

The court proceeded to hold that "the Nevada Supreme Court would likely turn to the Restatement (Second) of Torts (hereinafter referred to as 'the Restatement') for guidance on this issue. Our finding is based on the fact that Nevada's highest court has often shown a willingness to rely on the Restatement." Id. at 832.

Restatement (Second) of Torts, § 674, Comment J (1976) states:

Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, depends upon the circumstances under which the proceedings

are withdrawn.

This Court is of the opinion that the trial court reached the right conclusion. Since it was a voluntary dismissal, the suit readily could have been revived at anytime within the year. To call this a "termination" is a misnomer. Furthermore, Boyle was not faced with extended litigation, for Thomas' motion for summary judgment was pending at the time.

The supporting evidence for the motion was already in being--the entire record in the underlying case. If granted, once it became final, there would be a disposition which would in turn be favorable to plaintiff. Considering the posture of the pleadings, Boyle's motion for a voluntary nonsuit called upon the trial judge to exercise his judicial discretion in considering and disposing of it. We find no abuse of that discretion.

***5** In so holding, we endorse the findings and principles enunciated in the case of Selas Corp. of America v. Wilshire Oil Co. of Texas, 57 F.R.D. 3 (E.D.Pa.1972). Plaintiff brought an action against several corporate and individual defendants who allegedly took part in an unlawful plan to take control of plaintiff. Defendants Kelly and others filed counter-claims sounding in libel, abuse of process and malicious prosecution. The trial court dismissed the malicious prosecution claim because an essential element, the termination of the action favorable to defendant, was missing. Selas settled with all defendants but Kelly and moved for dismissal of its complaint against him without prejudice. Kelly opposed the motion, contending that a dismissal without prejudice could have the effect of barring him from successfully maintaining an action for malicious prosecution against Selas.

In denying Selas' motion for a voluntary dismissal, the court stated:

However, we have concluded that a dismissal without prejudice, by effectively precluding Kelly from maintaining an action for malicious prosecution, would result in such prejudice and injustice to the defendant that we feel compelled not to grant plaintiff's motion.

* * *

Kelly claims not only that he has been inconvenienced by his involvement in this case, but also that Selas acted with malice and without reasonable grounds in suing him in the first place. While we express no opinion whatever on the merits of his claim, we think he has a right at some point at least to be heard on it.

A dismissal without prejudice is not a final adjudication on the merits; instead, it leaves the parties where they would have stood had the lawsuit never been brought [citations omitted]. Kelly therefore has ample basis for his fear that a dismissal without prejudice would make it impossible for him ever to sue Selas for malicious prosecution, since the termination of this action favorable to the defendant is "the sine qua non of a malicious prosecution claim."

Id. at 6.

Furthermore, we find the following observations by the Selas court appropriate and applicable to the case at bar:

We do not mean to imply that by filing a counterclaim in malicious prosecution, or by professing an intention to do so later, any defendant may defeat any motion for dismissal without prejudice. Such a rule would undoubtedly make it impossible for a plaintiff ever to dismiss voluntarily without prejudice. Our decision is limited very closely to the facts of this case.

Id. at 7.

II. THE SUMMARY JUDGMENT ISSUE.

Boyle's cross-complaint for indemnity, as amended, against Thomas alleges in part as follows:

In the performance of his duties as owner of the Bolivar Plaza Shopping Center, cross-defendant Thomas approved and accepted the Bolivar Plaza Shopping Center and then, without notice to Boyle and without Boyle's knowledge or consent, made certain changes and alterations in said shopping center. These changes and alterations, including but not limited to ordering the installment in 1981 of a new, heavier roof on the Magic Mart section of the Bolivar Plaza Shopping Center, constituted active negligence and were a proximate cause of the partial

collapse of the Bolivar Plaza Shopping Center. Cross-plaintiffs deny that they were in any way negligent and deny that they were guilty of any act or omission that in any way proximately caused the partial collapse of the Bolivar Plaza Shopping Center or the injuries alleged by plaintiffs. However, if any action or omission of cross-plaintiffs should be found to have been a proximate cause of the partial collapse of the Bolivar Plaza Shopping Center or of the injuries alleged by plaintiffs, the negligence of cross-plaintiffs, if any, is derivative only and was passive, involving merely the failure to discover the negligence and wrongdoing of Thomas. Cross-plaintiffs Boyle and its employees Horrell and Conrad are therefore entitled to indemnity from Thomas for any judgment which may be found against them in any amount.

***6** In its motion to amend its cross-complaint, Boyle stated in part as follows:

6. Cross-defendant, Harlan Thomas, was the owner of the Bolivar Plaza Shopping Center; was on the premises on a day-to-day basis and was familiar with the construction; was in frequent contact with the on-site construction supervisor, Howell Nabors, and had construction plans in his possession; and if any variance as alleged by plaintiff occurred, knew or in the exercise of reasonable care should have known of such variance in construction from the plans. Cross-defendant, Harlan Thomas, as Mayor of Bolivar, was in charge of the Building Department and was familiar with the variance from accepted construction techniques and from construction plans as reported by the Building Inspector of the City of Bolivar or as known by him, and cross-defendant either approved or failed to take any action to correct the condition. Cross- plaintiffs alleged, therefore, that if there was any negligence in connection with the construction of the Bolivar Plaza Shopping Center as alleged by plaintiff, the cross-defendant was guilty of active negligence whereas the acts of negligence alleged against cross-plaintiff constituted passive negligence. Cross-plaintiffs, Boyle Investment Company, et al., are therefore entitled to indemnity from cross-defendant, Harlan Thomas, for any amounts which cross-plaintiffs may be called upon to pay to plaintiffs.

Boyle contends that the trial court erred in granting Thomas' summary judgment motion in that a number of issues of material fact exist as to whether or not it was guilty of passive and/or Thomas was guilty of active negligence.

Summary judgment is appropriate only if it is shown that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." T.R.C.P. 56.03. In ruling on motions for summary judgment, both the trial court and this Court must consider the matter in the same manner as a motion for a directed verdict made at the close of plaintiff's proof; i.e., we must view all affidavits in the light most favorable to the opponent of the motion and draw all legitimate conclusions of fact therefrom in that favor. Stone v. Hinds, 541 S.W.2d 598, (Tenn.App.1976).

Both Boyle and Thomas rely upon various aspects of the record in the underlying Price case. Boyle contends that there is a factual dispute regarding its involvement in the construction of the shopping center. More specifically, Boyle argues that there is testimony in the record from which the trier of fact could find that Howell Nabors, and not Boyle, was the general contractor for the construction of the shopping center. Boyle further contends that its duties were limited to such specific functions as periodic examination of the construction as it progressed, routinely checking the materials and labor that went into the construction, verifying bills to Thomas and seeing that any liens that might arise were taken care of, and the like. On the other hand, Thomas contends that for the purposes of Boyle's cross-claim against him, Boyle cannot rely upon testimony it attempted to produce at trial wherein Boyle attempted to vary or contradict the terms of an unambiguous written contract entered into between Boyle and Thomas for the construction of the shopping center. Thomas contends that this contract provided that Boyle was to be the general contractor for the shopping center. The trial court ruled, and we think properly so, that under the parol evidence rule, any and all testimony offered for the purpose of varying, altering or contradicting the terms of the written contract regarding the responsibilities and duties between Boyle and Thomas would be excluded.

***7** Parol evidence is inadmissible to vary, alter or contradict the terms of an unambiguous written contract except on the grounds of fraud, accident or mistake. Brown v. Brown, 45 Tenn.App. 78, 320

S.W.2d 721 (1958); Starnes v. First American Nat. Bank of Jackson, 723 S.W.2d 113 (Tenn.App.1986). It is undisputed that Thomas, as the owner of the shopping center, entered into a written contract with Boyle on October 4, 1973 that provided and stated that Boyle would serve as general contractor for the construction of the Bolivar Plaza Shopping Center. Both Thomas and Robert Horrell, Sr., on behalf of Boyle, signed the contract. This particular contract between Boyle and Thomas is the only written construction contract in the record. Boyle does not allege fraud, accident or mistake, regarding the execution of the contract. Furthermore, Boyle does not contend, nor does the record reflect, that Boyle and Thomas orally modified the contract subsequent to entering into the agreement so as to provide that Nabors, and not Boyle, would be the general contractor.

The parol evidence rule applies only to oral agreements made prior to or contemporaneous with a contract, and not to oral agreements made subsequent to the original contract. See Rush v. Chattanooga Du Pont Emp. Credit Union, 210 Tenn. 344, 358 S.W.2d 333 (1962); Starnes, supra, at 118. We hold that Boyle and Thomas, the parties to the written agreement, are bound by the terms of their contract in stating and providing that Boyle would be the general contractor for the construction of the shopping center. Boyle cannot now offer parol evidence to show that it was not the general contractor under these circumstances.

Boyle also contends that there is a factual dispute as to the proximate cause of the collapse of the roof. According to Boyle, the added weight of the new roof installed by Thomas subsequent to the completion of the shopping center was the proximate cause of the collapse, as opposed to faulty construction of the premises in the first place. This contention is contrary to all the proof presented at trial. All experts, even Boyle's, testified that the proximate cause of the collapse was due to faulty construction.

Glenn Bell, a structural engineer, testified as an expert on behalf of plaintiff Price. After the collapse, Bell spent two days on the site studying the debris, taking measurements, obtaining samples and performing various tests. Based upon all of the above, Bell testified that the building had not been constructed in accordance with the original plans prepared by the architect. Bell testified as to many deviations from the plans. For instance, Bell testified that in the collapsed section the plans called for twenty-four- inch-wide bar joists, which had been replaced with twenty-two-inch bar joists. He stated that the bar joists used were of a design that would support less of a load than the bar joists called for in the plans.

According to Bell, the plans called for the anchor bars to the bar joists to be imbedded in concrete in a concrete block wall. Some of the joists had no anchors at all. Bell also found that although the plans called for solid concrete filling below each beam-bearing location, this was not done. In addition, extra bar joists to be located where the roof-top mechanical units were placed were omitted.

***8** Bell also found that the main roof beams were not of the strength called for in the plans. They were lighter, had less steel per foot, and were incapable of supporting the amount of weight that the beams called for in the plans would support. He also found and so testified that the pipe columns supporting the beams were not as strong as those called for in the plans. Bell also found and noted that the lintel beams in the columns at locations 2-A and 3-A also were lighter and had less load-carrying capacity than that specified in the plans. Bell voiced the opinion that as the collapsed building was constructed, it had "half, about half or even less, of the strength or load- carrying capacity that it should have had if it was constructed according to the Southern Standard Building Code."

Bell was of the opinion that the plans and specifications for the structure of the building reflected a safe design, and that the plans complied with the Southern Standard Building Code (SSBC). He observed that after the initial construction, a new roof consisting of wood fiber insulation board, tar, felt and gravel had been added to the existing roof, and that the total weight of the roof, including additions, but without water, was approximately 400,000 pounds. Bell was of the opinion that had the building been constructed in accordance with the SSBC, the building would have resisted "safely a load of at least 650,000 pounds." Bell calculated the weight of the ponded water on the roof to be between 18,000 and 25,000 pounds. According to his testimony, the total weight of the roof, including the new roof and ponded water, was an insignificant

amount of additional weight, and that had the structure been built in accordance with SSBC requirements, the roof structure should have easily been able to withstand the load placed upon it.

It was Bell's opinion that the principal cause of the collapse of the building was "the inadequate capacity of this beam column connection [at D-2] ... and in particular the lack of the bottom chord extensions and the lack of the stiffening plates over the beam and the undersize of the beam itself. That is, a beam is provided with less capacity than called for on the design drawings."

As stated further by Bell, while the additional roofing contributed to the collapse, it was not the cause. In his opinion, had the building been built in accordance with the original plans and specifications, it would still be standing. Bell opined that he had investigated many structural phases and had been involved with much construction, but that the construction of this building was "the worst I have ever seen." He was also of the opinion that with the exception of the lowering of the roof, which allowed the construction of a mezzanine to project out, the nature of the changes made were such that it would take a person trained by either education or experience in the construction industry to recognize these changes, and that one would not expect a lay person walking around the job site to recognize them.

***9** Robert E. Horrell, Jr., a son of defendant Robert Horrell, Sr., as an architect, was responsible for the preparation of the plans and specifications. After viewing the collapsed building, he testified that the building had not been built in accordance with the plans that he had prepared. He stated that the major deviations from the plans were the size and arrangement of the beams and bar joists. Another major deviation was that the plans called for the wall sections to be filled with concrete to provide additional support, and that this was not done. He was of the opinion that the plans as drawn were good plans, that the construction of the shopping center was bad, and that had the building been constructed in accordance with the plans and specifications, it would still be standing.

Edwin McDougal, a consulting structural engineer, testified as an expert on behalf of Boyle. McDougal testified that following the collapse, he visually observed the building, measured the beams, bar joists and columns, took photographs, cut out a section of the roof and removed a portion of the roof deck. He testified that he spent several days making calculations and evaluations of the structure, examining the drawings furnished to him and comparing the measurements he made with the measurements on the drawings. In addition, he testified that he made calculations in order to determine the capacity of the building to "hold up a load and determine how it was constructed in comparison to the plans."

McDougal testified in detail about the deficiencies in construction. For one, he testified that in the area of the collapse the supporting beam measured sixteen inches deep and weighed thirty-one pounds per foot. At these locations the beams were supposed to be eighteen inches deep and weigh fifty pounds per foot. He stated that the difference in the actual strength of the two beams was about two times. It was McDougal's opinion that the principal cause of the failure was the overloading of the roof beam at column D-2, and that it was overloaded because the construction was of a size approximately half as strong as the one shown on the drawing. He stated that the beam was not as strong as it should have been. Thus, it was not strong enough to withstand the weight of the water and added roof. It was McDougal's opinion that if the building had been constructed in accordance with the plans and specifications as well as the SSBC, it would have still been standing at the time of trial. He also testified that while the added weight of the additional roof and water was a contributing factor, had the roof been constructed properly in the first place, it would have withstood the additional stress, in his opinion.

In addition to finding that the main beams were under-strengthened by some fifty-three percent, he found that the bottom chord lines were not adequately braced. In addition, he testified that he found several other problems that dealt with the ability of the building to withstand the forces that it was supposedly designed to withstand. He also testified that he found many deviations from the SSBC which were not good and which contributed to the collapse of the building. It was also his opinion that the deviation from the plans and the violations of the SSBC should have been observed and recognized during construction by inspection of a

trained, experienced construction manager.

***10** From a review of all the testimony adduced at trial in the underlying Price lawsuit, it is our opinion that the shopping center roof collapsed because it was not built in accordance with the plans and specifications prepared for that purpose, and that it was not built in compliance with the SSBC.

Having so concluded, we next must determine whether or not Thomas is entitled to a judgment as a matter of law that Boyle's negligence was active, and Thomas' negligence, if any, merely passive, thereby precluding any right of Boyle to indemnity from Thomas.

The rule has long been established in this state that one guilty of only passive, rather than active, negligence can recover indemnity. Continental Ins. Co. v. City of Knoxville, 488 S.W.2d 50 (Tenn.1972); Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933).

In examining the proof in light of the above authorities, it is thus undisputed that the proximate cause of the collapse of the shopping center building was faulty construction. Boyle, as general contractor, and widely experienced in commercial construction, bore the responsibility and actively participated in the negligent construction of the shopping center. Boyle's conduct cannot be characterized as merely passive, but active. This in and of itself prevents Boyle from obtaining indemnification from Thomas.

Accordingly, the judgment of the trial court is affirmed in all respects. Costs on appeal are taxed to Boyle, for which execution may issue if necessary.

HIGHERS and FARMER, JJ., concur.

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