Voluntary Dismissals and the Savings Statute: Has Rule 41(A) Changed the Law

J. Patrick Browne

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PRIOR TO THE ADOPTION OF THE NEW Ohio Rules of Civil Procedure, it had been held that a suit voluntarily dismissed could not be refiled under the provisions of the savings statute. Ohio Civil Rule 41(A) replaced the prior Code section providing for voluntary dismissals and, by its language, suggested that at least one refiling of the suit would be permitted under the savings statute. However, the one reported judicial decision squarely on point at the time of this writing, Brookman v. Northern Trading Co., rejects the apparent purpose of Rule 41(A) and adheres to the pre-Rule view of the law. This article will examine the arguments made in support of that decision, and will find them unpersuasive. It will conclude with the suggestion that Rule 41(A) has indeed changed the law.

The Problem

The essential problem can be stated rather simply: plaintiff files his action well within the statute of limitations. Then, after the statute has run, he files a notice of voluntary dismissal without prejudice. Within the year following the voluntary dismissal, he attempts to refile the action, and is met with a motion to dismiss under Rule 12(B)(6) on the ground that the action had not been brought within the time permitted by law. What result?

The answer depends, at least in part, on the interpretation of section 2305.19 of the Revised Code — the savings statute. In pertinent part, that section reads:

In an action commenced, or attempted to be commenced, ... if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff ... may commence a new action within one year after such date.

Thus, the question comes to this: is a voluntary dismissal without prejudice a “failure otherwise than upon the merits”?

The Pre-Rule Solution

The pre-Rule decisions of the Ohio Supreme Court have concentrated on the word “fail” almost to the exclusion of the remainder of the phrase: “otherwise than upon the merits.” In early considera-
tion of the problem, the Court concluded that a voluntary dismissal could not be a “failure” as the word was properly understood, and with but one momentary hesitation, the Court has adhered to that view, albeit with some qualification as to when a dismissal is truly “voluntary.” Thus a summary of the pre-Rule law of Ohio reveals that a voluntary dismissal of an action is not a failure of that action as that term is used in Ohio Revised Code section 2305.19, unless that dismissal follows, and is motivated by, an “adverse ruling” of the trial court which prevents the dismissing party from going forward.

2 Siegfried v. New York, L.E., & W.R.R., 50 Ohio St. 294, 34 N.E. 331 (1893), the Supreme Court held:

To fail implies an effort or purpose to succeed. One cannot, properly, be said to fail in anything he does not undertake, nor, in an undertaking which he voluntarily abandons. . . . [A] failure in the action, by the plaintiff, otherwise than upon the merits, imports some action by the court, by which the plaintiff is defeated without a trial upon the merits. . . . A dismissal by the plaintiff, involves no action of the court; it is a voluntary withdrawal of his case, and is not a failure in the action.

3 In Cero Realty Corp. v. American Mfrs. Mut. Ins. Co., 171 Ohio St. 82, 167 N.E.2d 774 (1960), the plaintiff voluntarily dismissed its action after demurrers to its amended petition had been sustained. The demurrers were grounded on improper joinder of defendants. The Supreme Court permitted a refiling under the savings statute, holding that the voluntary dismissal was the equivalent of a failure since the ruling of the trial court was such that plaintiff could not go forward with the action, and the only alternative to a voluntary dismissal was an entry of dismissal by the court. Further, since the reason for the voluntary dismissal was a ruling on a technical point of procedure (misjoinder of parties) rather than on a substantive issue, the voluntary dismissal was “otherwise than upon the merits.” So far, the decision is in harmony with Siegfried, but the Court went on to add the following dictum taken from Annot., 86 A.L.R. 1033, 1051 (1933):

It has never been questioned that an involuntary or compulsory nonsuit is within the meaning of the statute and gives the plaintiff the right to bring a new action within the time prescribed thereafter, but the claim has been made that a voluntary nonsuit is not such a nonsuit as the statute contemplates. However, it has been held almost without exception that such a construction of the statute is too narrow, and that voluntary as well as involuntary nonsuits are within its beneficient operation.

The cited dictum in the Cero case misled the lower courts of Ohio into thinking that the rule of Siegfried had been abandoned, as the Court of Appeals for Franklin County put it in Beckner v. Stover, 13 Ohio App. 2d 222, 224, 235 N.E.2d 536, 538 (10th Dist. 1968):

The court in Cero quoted with approval from 86 A.L.R. 1051 to the effect that a distinction between involuntary and voluntary nonsuit "has been held almost without exception" to be too narrow. An exception is the Siegfried case. In our opinion, Siegfried is no longer the law of Ohio. Any voluntary nonsuit or dismissal under Section 2323.05(A), Revised Code, qualifies an action as one which "fails" within the meaning of Section 2305.19, Revised Code.

4 The Supreme Court set the record straight in Beckner v. Stover, 18 Ohio St. 2d 36, 247 N.E.2d 300 (1969), when it said, at 40 (247 N.E.2d at 302):

In short, the Cero case did not renounce the basic thrust of Siegfried [sic.], which was that "a failure in the action, by the plaintiff, otherwise than upon the merits, imports some action by the court, by which the plaintiff is defeated without a trial upon the merits." (Emphasis added.) Siegfried [sic.], supra at 296. To hold otherwise would be to establish a rule whereby litigants could substitute a voluntary dismissal without prejudice for an appeal from claimed errors occurring during a trial. Under such a practice, parties could try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved. In our opinion, Section 2305.19, neither provides for nor permits such a practice.

with his case. Furthermore, if the "adverse ruling" goes to a technical point of practice or procedure, and not to the substance of the case, the subsequent voluntary dismissal is a failure "otherwise than upon the merits," so that the action may be refiled within a year of the dismissal if the dismissal took place after the statute of limitations had run. These elements constitute what will hereinafter be referred to as the Siegfried-Cero-Beckner rule.

None of this, of course, provides a solution for the problem presented when the voluntary dismissal is taken before the expiration of the statute of limitations, and that statute runs before the plaintiff has an opportunity to refile, since the savings statute is not applicable to such a situation. Further, the determination of when a dismissal is "otherwise than upon the merits" has produced some rather interesting results. A dismissal for want of subject matter jurisdiction is, for example, "otherwise than upon the merits," but a dismissal for lack of in personam jurisdiction, or for improper venue, is not.

In any case, the pre-Rule courts would, in most instances, grant the motion to dismiss and deny the plaintiff an opportunity to refile his action.

The Enigma of Rule 41(A)

With the advent of the Civil Rules, section 2323.05 of the Ohio Revised Code was replaced by Rule 41. In the part pertinent to our inquiry, that Rule reads:

(A) Voluntary dismissal: Effect thereof.
(1) By plaintiff; by stipulation. An action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication

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6 Uhas v. New York Cent. R.R., 70 Ohio App. 464, 46 N.E.2d 677 (1942). The court said:

It will be noted when the action was dismissed by the plaintiff in November 1938, the two-year limitation provided for the bringing of such action under Section 11224-1, General Code [OHIO REV. CODE 2305.10] had not yet expired; therefore, Section 11233, General Code [OHIO REV. CODE 2305.19], the statute titled "Saving in case of reversal," etc., did not apply, for that section by its specific terms applies only when "the time limited for the commencement of such action at the date of reversal or failure has expired," that is failure "otherwise than upon the merits" (emphasis added).

Id. at 466, 46 N.E.2d at 678.


8 Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

The question then becomes: if the voluntary dismissal is taken after the statute of limitations has run, may the plaintiff refile his action at least once under the terms of Rule 41(A)(1), or is the refiling barred by the prior judicial interpretation of the word "fail" in the savings statute?

Surprisingly enough, the Rules Advisory Committee Staff Note leaves the question unresolved. It reads:

If plaintiff voluntarily dismisses without a court order under Rule 41(A)(1) after the applicable statute of limitations has run for his particular action, has he failed otherwise than on the merits and may he file over again under the "savings statute"? The answer is not clear; hence plaintiff would be taking a dangerous chance. See, Cero Realty Corp. v. American Manufacturers Mutual Ins. Co., et al., 171 Ohio St. 82 (1960).

The two authorities who have commented directly on the point are divided in their answer. Dean McCormac suggests that the pre-Rule decisional authority is still applicable, and refiling should not be permitted, but Professor Jacoby holds that "logic and reason" would dictate the opposite result. Milligan does not expressly take a position, but merely notes the previous Ohio decisions which have held that a voluntary dismissal is not a "failure" of the action and thus, by implication, supports McCormac's view.

As one might expect, case authority is, as yet, rather sparse. Dictum in Howard v. Allen cites the Siegfried-Cero-Beckner rule for the proposition that "... a voluntary dismissal is not a failure otherwise than upon the merits within the meaning of R.C. 2305.19," and thus suggests that the pre-Rule interpretation of the statute is still in effect.

The Brookman Solution

The one case directly on point is Brookman v. Northern Trading Co. Here, plaintiff timely filed his action but, after the statute of limitations had run, voluntarily dismissed it by notice of dismissal,
which specifically stated that the dismissal was without prejudice. When the action was refiled at a later date, defendant moved to dismiss it on the ground that it had not been brought within the time limited by law for the commencement of the action. The trial court granted the motion on the ground that the previous voluntary dismissal of the case was not a failure otherwise than upon the merits within the meaning of the savings statute. Plaintiff appealed, and the court of appeals affirmed the decision of the trial court.

Essentially, plaintiff argued that the plain language of Civil Rule 41(A)(1) gave him a clear and unqualified right to refile his action at least once, whether or not the statute of limitations had run. If the prior judicial interpretations of the savings statute were applied to it, then the savings statute is in conflict with Rule 41(A)(1), and to that extent, the statute has been repealed by the language of Article IV, Section 5(B) of the Ohio Constitution, which reads:

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The court of appeals premised its rejection of this argument on four more or less separate grounds, the first two of which deal with the implied repeal of §2305.19, while the third and fourth go to the continued applicability of the Siegfried-Cero-Becker interpretation of the word "fail" as it is used in that statute. The court's arguments may be summarized as follows:

First, Amended House Bill 120116 repealed a large number of statutes in conflict with the Civil Rules, but §2305.19 was not one of those so repealed. Thus, it is not in conflict with the Civil Rules.

Second, there is no evidence to indicate that Rule 41(A)(1) was intended to directly limit the operation of §2305.19. Rather, it would appear that the intention of the draftsmen of the rule was to limit

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16 133 LAWS OF OHIO 3017 (1970). The complete text of Section 3 of Amended House Bill 1201 is as follows:

That the taking effect of the Rules of Civil Procedure on July 1, 1970, is prima-facie evidence that the sections of the Revised Code to be repealed by Section are in conflict with such rules and shall have no further force or effect, except that for the purposes of depositions in criminal cases under section 2945.54 of the Revised Code, procedures adopted by reference to sections 2319.05 to 2319.31, inclusive, of the Revised Code, shall continue effective without change, unless a court shall determine that one of such sections, or some part thereof, has clearly not been superseded by such rules and that in the absence of such section or part thereof being effective, there would be no applicable standard of procedure prescribed by either statutory law or rule of court. The failure to repeal or amend any other section establishes no evidence concerning its conflict with such rules.

For a history and explanation of the Bill, see Puckett, Effect of the Ohio Rules of Civil Procedure on Existing Statutes, 43 OHIO BAR, No. 29, at 835 (July 20, 1970).
voluntary dismissals to a single dismissal without prejudice and, as the previously quoted staff note indicates, they were uncertain as to the effect of §2305.19 on Rule 41(A) (1).

Third, Howard v. Allen,17 a post-Rule decision, applies the Beckner rationale to this very situation, and thus affirms its post-Rule viability.

Fourth, the Beckner decision clearly affirms prior decisional authority to the effect that a voluntary dismissal is not a “failure” as that term is used in §2305.19. The Supreme Court was aware of that decision when it amended the Civil Rules in 1971 and 1972, and had the Court intended that decision not apply to Rule 41(A) (1), it could have clarified the rule by amendment. But it did not, even though it otherwise amended Rule 41 in 1971. Therefore, it must be concluded that no exception was intended.

Critique of Brookman

The Failure to Expressly Repeal §2305.19

Despite the fact that the court describes this argument as “much more significant” than its other arguments, it remains singularly unconvincing. As the court itself pointed out,18 Section 3 of Amended House Bill 1201 specifically provides that any of the Code Sections repealed by Section 1 of the bill may survive in whole or in part if it is found that in the absence of such survival “there would be no applicable standard of procedure prescribed by either statutory law or rule of court.” But if an expressly repealed statute can survive at least in part because it is necessary to fill a gap in procedure, then the converse must also be true: an existing statute may be impliedly repealed in part because it is no longer necessary and, because of a conflict with a rule, creates an inconsistent duplication in procedure. That this may indeed be the case is evidenced by the last sentence of Section 3 of the bill, which reads: “failure to repeal or amend any other section establishes no evidence concerning its conflict with such rule.” Thus, an unrepealed or unamended statute might still be wholly or partially in conflict with a Rule and, to that extent, repealed by implication. Accordingly, the fact that §2305.19 was not expressly repealed “establishes no evidence concerning its conflict” with Rule 41(A) (1).19

17 28 Ohio App. 2d 275, 277 N.E.2d 239 (10th Dist. 1971).
18 33 Ohio App. 2d at 255, 294 N.E.2d at 915-16.
19 As Professor Harper notes in 4 ANDERSON’S OHIO CIVIL PRACTICE, §147.01, at 37 (1973):

Of course, many statutes in obvious conflict with the Civil Rules and which ought to have been repealed, were not repealed. Section 3 of House Bill 1201 recognizes the fact and provides: "The failure to repeal or amend any other (Continued on next page)
The Intent of the Draftsmen

This second argument is more difficult. Basically, its thrust is two-pronged: 1. There is no evidence to indicate that the rule was intended to limit the operation of the savings statute, and 2. the intent of the draftsmen was to limit voluntary dismissals to a single dismissal without prejudice, and this latter point is supported by the staff note concerning the uncertain effect of the Cero decision on the taking of a first voluntary dismissal after the statute of limitations had run.

First of all, it would be inappropriate for the rule to expressly state which sections of the Revised Code, if any, it was superseding. In addition, the problem is likely to arise only with those actions governed by the shorter statutes of limitations rather than the longer ones, and any express language exempting Rule 41(A) (1) from the operation of §2305.19 would not be needed in all cases. Thus, it would be inappropriate to create ambiguity by including in the rule language that would be applicable to some, but not all, cases to which it applied. Accordingly, one is bound to fail if he searches the rule for express language limiting the operation of the savings statute.

However, the limitation does appear by implication from the language of the rule. The first voluntary dismissal by notice is characterized as "without prejudice"; that is, the taking of the voluntary dismissal will not bar another action on the same claim or cause of action. But the second voluntary dismissal by notice is characterized as an adjudication "upon the merits." The taking of the second voluntary dismissal by notice raises the bar of res judicata to another action on the same claim. Since the first voluntary dismissal does not raise the bar of res judicata, it must follow that the first voluntary

(Continued from preceding page)

section establishes no evidence concerning its conflict with such rules." In short, for some time to come it will be up to the practitioners and the courts to follow the Civil Rules and ignore conflicting procedural statutes still remaining in the Revised Code.

Again, in the first paragraph of his preface to OHIO REV. CODE ANN., Civil Rules, (Page 1971), he says:

The Civil Rules supersede many Ohio procedural statutes, modify others and depend by direct or indirect reference upon still other Ohio procedural statutes (emphasis added).

And Puckett states:

It therefore appears (except as to any rule which might purport to have a prohibited effect on a substantive right) that any portion of the Revised Code which "conflicts" with the Rules was effectively superseded on July 1, 1970, without any action of the General Assembly. This follows from the fact that the 108th General Assembly adjourned sine die on June 26, 1970, without having adopted the concurrent resolution of disapproval which would have been necessary to prevent the taking effect of the Rules of Civil Procedure (emphasis added).

See Puckett, supra note 16, at 836.
dismissal is not upon the merits; it is "otherwise than upon the merits." From this the second implication follows: one who voluntarily dismisses by notice "fails otherwise than upon the merits" if it is his first dismissal, but fails "on the merits" if it is his second dismissal of the same claim. From this juxtaposition of "without prejudice" and "adjudication upon the merits" the intent of the draftsmen becomes apparent: a party is entitled to one completely "free" voluntary dismissal by notice, whenever taken. Of course, to say that this intent limits the savings statute itself is to say too much, for there is nothing inconsistent between this view and the language of the savings statute; the two are in harmony. Rather, it would be more correct to say that this implied limitation is on the judicial interpretation of the savings statute, and not on the statute itself.

Again, a similar limitation appears from an application of Rule 41(A) (1). Suppose that prior to the running of the statute of limitations, plaintiff files notice of his voluntary dismissal without prejudice, and then refiles his action. Now, after the statute has run, he again files notice of his voluntary dismissal without prejudice in response to an adverse ruling of the trial court which prevented him from going forward to a trial on the merits. Under the Siegfried-Cero-Beckner rule, this second voluntary dismissal would be a failure otherwise than upon the merits and, under the provisions of §2305.19, he could refile a third time if the refile was within a year of the second voluntary dismissal. But under Rule 41(A) (1), this third refileing would be denied him, because the second voluntary dismissal would be an adjudication upon the merits. Thus, in this instance, the language of Rule 41(A) (1) not only limits the judicial interpretation of §2305.19, but it also renders inapplicable the definition of "merits" found in the Cero decision.

20 As Judge Corrigan put it:
In the words of the first rule, "these rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and other impediments to the expeditious administration of justice." This language summarizes the guiding principles followed by the lawyers who have labored in the adoption of the new rules and whose purpose was to formulate such procedure as will promote the speedy trial of cases and substantially eliminate the disposition of cases on technical grounds, without consideration of the merits.

See J. Corrigan, A Look at the Ohio Rules of Civil Procedure, 43 Ohio Bar, No. 24, (June 15, 1970) at 727-28. An application of the Siegfried-Cero-Beckner rule would not "eliminate the disposition of cases on technical grounds, without consideration of the merits"; it would do the very opposite.

Where the word, "merits," is used in speaking of the determination of an action upon the merits, it embraces the consideration of substance, not of form; of legal rights, not of mere defects of procedure or practice or the technicalities thereof.

There is nothing in the Beckner decision that would indicate a departure from this portion of the Cero decision.
Yet it can be argued that the phrase "adjudication upon the merits" was intended to accomplish the prime goal of limiting voluntary dismissals to one, and was not intended to limit the judicial interpretation of the savings statute. However, in the instance cited, the prime purpose of the rule (assuming it to be such) could not be achieved unless that interpretation was limited. Thus, it can be concluded that the draftsmen used that language to specifically render inapplicable the Siegfried-Cero-Beckner rule in a case such as this, and thus limit the savings statute. Accordingly, it cannot be said beyond peradventure of doubt that there is nothing in the rule intended to limit the judicial interpretation of §2305.19. Indeed, the opposite conclusion would appear to be more correct.

This view, of course, conflicts with the precise holding of Beckner, but it does not conflict with the spirit of that decision. There the Court sought to limit the taking of voluntary dismissals in order to prevent parties from trying and retrying "their causes indefinitely until the most favorable circumstances for submission were finally achieved."22

Under the Code, the goal of curbing voluntary dismissals could only be achieved in limited circumstances,24 but Rule 41 (A) (1) achieves the goal in all circumstances by permitting only one really "free" voluntary dismissal — the first voluntary dismissal by notice.25 Consider the following:

1. If the first and second voluntary dismissals by notice are both taken before the statute of limitations runs, a second refiling before the running of the statute is barred because the second voluntary dismissal, as an adjudication on the merits, is res judicata.

22 Here, also, is an instance where the application of the language of the rule would lead to the elimination of delay and the speedy trial on the merits which Judge Corrigan saw as the guiding principles of the draftsmen. The application of the Siegfried-Cero-Beckner rule would again achieve an opposite result. See Corrigan, supra note 20.

23 18 Ohio St. 2d at 40, 247 N.E.2d at 303.

24 Under the Code, nothing could be done to curb voluntary dismissals and refilings occurring before the statute of limitations had run, since §2323.05 provided for unlimited voluntary dismissals in that situation. If the voluntary dismissal took place before the statute had run, but the refiling afterward, the matter was either in limbo, because no statute applied to it, or the second action was barred because the statute of limitations had run, and the saving statute did not save it, the dismissal not having taken place after the statute had run. ( Apparently, this precise question has never been resolved.) But if the voluntary dismissal and the refiling both took place after the statute had run, the second action could be barred by judicial construction which limited the word "fail" as used in §2305.19. Thus, under the Code, this latter is the only instance in which voluntary dismissals could be controlled.

25 The words "by notice" must be emphasized, since Rule 41 also permits voluntary dismissals by stipulation and pursuant to motion. If the second voluntary dismissal is by stipulation or pursuant to motion, it is not an "adjudication upon the merits." However, such voluntary dismissals will not be easily obtained, and the mere possibility of such an event does not detract from the limiting purpose of the rule. That purpose is stated thus:

This "two dismissal" rule, as it is called, was intended to prevent delays and harassment by plaintiff securing numerous dismissals without prejudice.

2. If the first and second voluntary dismissals by notice are both taken before the statute of limitations runs, a second refiling after the running of statute is barred because the second voluntary dismissal, as an adjudication on the merits, is res judicata. Thus the lacuna existing under the Code is disposed of.

3. If the first voluntary dismissal by notice takes place before the running of the statute, and the second voluntary dismissal by notice after the running of the statute, a second refiling is barred by the statute of limitations because the second voluntary dismissal, as an adjudication on the merits, takes the case out of the express language of the savings statute. Under the Siegfried-Cero-Beckner rule this effect might or might not be achieved, depending upon what action the trial court had taken prior to the second voluntary dismissal. In any case, this effect is achieved under the Rule by substituting the fiat of “adjudication upon the merits” for the Cero court’s definition of “merits.”

4. If the first and second voluntary dismissals by notice are both taken after the statute of limitations runs, a second refiling is barred because the second voluntary dismissal, as an adjudication upon the merits” formulation in Code §2305.19, and the addition of the word in curbing voluntary dismissals, and its uniformity of application, can only be achieved if the Siegfried-Cero-Beckner interpretation of the word “fails” is rejected. If it is not, the first voluntary dismissal by notice is not a “failure,” and the savings statute has no application. And if that should be the case, the uniform application of the rule in all instances is destroyed, and the rule is, to that extent, frustrated.

In sum, then, if Rule 41 is to have the desired effect of permitting, in all instances, only one completely “free” voluntary dismissal, and no more, it must limit the judicial interpretation of the savings statute in two ways: first, it must abrogate the Cero definition of “merits,” and second, it must abrogate the Siegfried-Cero-Beckner definition of “failure.” The former it does expressly; the latter it does by implication.

If it could do the former by express words, however, why could it not also do the latter? The abrogation of the Cero definition of “merits” lent itself to the use of express language; all that was required was the deletion of two words, “otherwise than”, from the “upon the merits, is res judicata. Here, of course, the salutary effect of the rule “adjudication.” Thus, the rejection of the Cero definition was achieved simply by negating the existence of the condition precedent to refiling found in the savings statute. The Rule formulation of “adjudica-
tion upon the merits” does this without any confusion and without any departure from its federal counterpart.\(^{26}\)

Abrogation of the *Siegfried-Cero-Beckner* rule of “failure” is not so favored. Additional language, and not a simple reformulation, would be required and, unless that language attempted to distinguish in some way between purely voluntary dismissals and “voluntary” dismissals in response to an adverse ruling of a trial court which prevented a trial on the merits, it might fall prey to the very interpretation it sought to exclude. Not only would such language require a significant departure from Rule 41’s federal counterpart (which departs the draftsmen sought to keep to a minimum both substantively and formally), but it would also require a number of “ifs”, “ands” and “buts” which could only lead to confusion in interpretation.

Thus, the best way to accomplish this latter abrogation was to so state the rule that on first reading it clearly gives the dismissing party one completely free dismissal, whenever taken, and to leave the abrogation to flow from that statement by implication.

But if that is what the draftsmen did, then why the uncertainty expressed in the previously quoted staff note? At this point, it might be well to take another look at the Advisory Committee’s language.

Rule 41(A) (1) and voluntary dismissal without prejudice by plaintiff without a court order before commencement of trial may be limited by court interpretation of the “savings statute,” §2305.19, RC. (Emphasis added).

Thus, the uncertainty is not with respect to the intention of the framers of the rule; they intended that the plaintiff have one free voluntary dismissal whenever taken. Rather, the uncertainty exists with respect to the Supreme Court’s commitment to the *Siegfried-Cero-Beckner* rule of interpretation. Although that interpretation is no longer necessary to achieve the purpose stated in *Beckner* — the

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\(^{26}\) In pertinent part, Federal Rule 41(a) (1) reads:

> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon 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 on or including the same claim.

That the Federal Rules were chosen as models is evidenced by Judge Corrigan’s statement:

> The committee followed the suggestion of the Supreme Court and used the Federal Rules as an outline and used the same numerical designations with such modifications, omissions and supplements as deemed necessary or desirable. The whole objective was to promote the efficient administration of justice by updating the rules governing civil procedure in Ohio courts. A careful study, rule by rule, was made in comparison with Ohio’s existing rules, before the adoption of any new rule. The committee was convinced of the distinct advantage in using the federally adopted rules as a model since there is a considerable body of decisions in the federal courts interpreting and applying these rules, and also in the majority of the states which have adopted similar rules.

*See J. Corrigan, supra* note 20, at 728-29.
curbing of voluntary dismissals — it might still be imposed on Rule 41(A) (1), and thus destroy its uniformity of application. It is to this danger that the practitioner's attention is drawn. The Advisory Committee proposes, but the Supreme Court disposes. 27

Accordingly, the Brookman court's second argument, like its first, is not wholly compelling. It is true that the framers of Rule 41(A) (1) primarily intended to limit the possibility of continuing voluntary dismissals, but permitting one voluntary dismissal and refiling after the statute of limitations had run does not conflict with this goal, and it does not follow that the draftsmen did not intend to authorize one voluntary dismissal and a refiling under the provisions of the savings statute. Rather, the reverse is true, to the extent that the savings statute has application in a given instance, for the uniform application of the rule would require such a result.

From all of the above, of course, it is clear that there is no inherent conflict between the express language of Rule 41(A) (1) and the express language of §2305.19; the conflict exists between the express language of Rule 41(A) (1) and the previous judicial interpretation of the savings statute. Thus, there is no need to find that §2305.19 has been repealed in whole or in part by Rule 41(A) (1), since the two may comfortably coexist; but there is a need to examine the continued viability of the Siegfried-Cero-Beckner rule of interpretation. And that brings us to Brookman's third and fourth arguments.

The Authority of Howard v. Allen

To be sure, Howard v. Allen, a post-Rule decision, does reaffirm the Siegfried-Cero-Beckner rule, but it does so in dictum in the nature of an aside, in which the rule is used as an example to illustrate another point. 28 It is doubtful, therefore, whether the court gave the same serious consideration to the point that it would have if the

27 SUPREME COURT OF OHIO STATEMENT CONCERNING OHIO RULES OF CIVIL PROCEDURE RULES ADVISORY COMMITTEE STAFF NOTES:

These Staff Notes were prepared and revised over a considerable period of time for the use of the Rules Advisory Committee and its subcommittees. Although the Supreme Court of Ohio used the Staff Notes as background for their deliberations on the Rules, it should be emphasized that they are Staff Notes and that where the Notes interpret the law, describe present conditions or predict future practices they are the views of the Rules Advisory Committee Staff and not those of the Supreme Court.

Reported in OHIO REV. CODE ANN., Civil Rules, at xi (Page 1971).

28 The full text of the dictum is as follows:

It might be noted that some distinction must be made in regard to a failure upon the merits or otherwise than upon the merits with regard to the applicability of R.C. 2305.19 and the applicability of the doctrine of res judicata. For example, a voluntary dismissal is not a failure otherwise than upon the merits within the meaning of R.C. 2305.19. Beckner v. Stover (1969), 18 Ohio St. 2d 36. However, such voluntary dismissal would ordinarily not be res judicata.
applicability of the rule had been the question at bar. There is a substantial difference between the product of mature reflection and an illustrative point taken from a judge's storehouse of memory and put as an example.

Further, the Howard court and the Brookman court are one and the same, although a partially different panel sat on each case.\textsuperscript{29} Thus, in citing Howard, the Brookman court was merely citing itself rather than a distinctly separate authority which has come to an identical conclusion. It is, in a sense, "boot-strapping." Accordingly, the court's third argument is more in the nature of a make-weight than anything else.

\textbf{The Supreme Court's Failure to Amend the Rule}

That leaves the fourth argument which, in substance, is this: had the Supreme Court intended that Rule 41 (A) (1) abrogate its prior interpretation of the word "fail" in §2305.19, it could have clarified the matter when it amended Rule 41 in 1971, and again when it made other amendments to the Rules in 1972. But it did not, and therefore it must be supposed that no abrogation was intended.

That is a two-edged argument, and it can cut both ways. Thus, it might be said that the "statutory" scheme of Rule 41 (A) (1) — that a party is entitled to one completely free voluntary dismissal whenever taken — was so apparent on the face of the rule that no clarification was required.

But, it will be said, the Howard and Brookman decisions refute this argument. The very fact of their existence called for an amendment if the decisions were not in accord with the Supreme Court's intent. However, the chronological relationship between these decisions and the 1971 and 1972 amendments was such that no correction of their views could appear in the amendments.\textsuperscript{30} In any case, amendment of the rules is hardly an appropriate method for a Supreme Court to use in correcting erroneous interpretations of those rules by lower courts.

\textsuperscript{29} The Howard decision was written by Judge Whitehead, with Judges Troop and Reilly concurring. The Brookman decision was written by Judge Troop, with Judges Strasbaugh and Holmes concurring.

\textsuperscript{30} The dictum in Howard v. Allen, the first reassertion of the old rule, was uttered on August 17, 1971, and first appeared in print in 44 OHIO BAR, No. 50, dated December 27, 1971. But the 1971 amendments to the rules were submitted to the General Assembly on January 15, April 14, and April 30, 1971, and became effective on July 1, 1971. See Rule 86(B). Thus, the case did not appear until after the 1971 amendments had become effective. The general amendments of 1972 were submitted to the General Assembly for approval on January 15 and May 1, 1972. See Rule 86(C). Had the Howard dictum come to the Supreme Court's attention prior to these latter submissions, it might still have been too late to include a clarification in any plan of amendment. Likewise, a disaffirmance of the Brookman decision could not have appeared in the
Thus, the Supreme Court's failure to clarify by amendment in 1971 and 1972 is inconclusive, unless it can be argued that the uncertain staff note to Rule 41(A) (1) required such clarification. But that staff note existed prior to the original enactment of the rules, so that clarification, if required, should have been in the original text of Rule 41(A) (1) rather than in an amendment. Accordingly, the failure to assert a clarification by amendment is insignificant.

However, the prior existence of the uncertain staff note raises a more disturbing point. Surely, the very expression of uncertainty itself called for a clarification; and would not the most proper place for such clarification be in the original text of the rule? If the Supreme Court had intended the abrogation of its prior decisional interpretation of "failure" would it not have spoken through the language of the rule?

It did, to the extent it fairly could within the limits imposed upon it by the nature of the rules themselves.

As we have seen when dealing with the Brookman court's second argument, it was the draftsmen's intention to retire the Siegfried-Cero-Beckner rule to the pre-Rule past since it would be wholly unnecessary to achieve the Beckner objective in a post-Rule future. But no simple reformulation of the language used in §2805.19 would work this change as it had worked a change in the Cero definition of "merits," nor would such a reformulation repeal the Siegfried-Cero-Beckner rule as it had the rule of Mason v. Waters. A substantial departure from the language of the federal counterpart to Rule 41 would be required, and this in itself was undesirable. Further, there could be no guarantee that the language of explanation would not fall victim to the same misinterpretation or, worse yet, give rise to some unforeseen misconstruction of its own. Finally, the problem would arise only in a limited number of cases, and it would not be wise to engraft specific explanations on rules of general applicability. Once that process was begun, there would be no end to it, and the opportunity for confusion and misunderstanding would in itself be limitless. Thus, the draftsmen did the only thing they could. They

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1973 amendments. Those amendments were submitted to the General Assembly on January 12, 1973. See Rule 86(D). Although Brookman was decided on November 21, 1972, it did not first appear in print until March 19, 1973, in the OHIO BAR of that date. (46 OHIO BAR, No. 12). Thus, the text of the decision was not available until after the 1973 amendments to the rules had been submitted to the General Assembly.

31 6 Ohio St. 2d 212; 217 N.E.2d 213 (1966). In substance, Mason v. Waters held that the dismissal of an action for lack of effective service of summons on the defendant was not a "failure otherwise than upon the merits." Rule 41(B) (4) stipulates that a dismissal for lack of jurisdiction over the person shall operate as a failure "otherwise than on the merits." But see Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (10th Dist. 1971).
stated their proposition simply and clearly, and left the repeal of Siegfried-Cero-Beckner to implication. They warned, however, of the danger inherent in such a solution.

The Supreme Court could do nothing to alleviate the danger. The advisory Committee Staff Notes were not its own, so it could not redraft them. Nor could it draft interpretive notes of its own with propriety, since it cannot render advisory opinions; and in any case, it neither had the time nor the staff for that purpose. Any attempt it might have make to redraft the rule itself would have fallen foul of the same inhibitors that frustrated the draftsmen. Therefore, the only thing it could do was adopt the draftsmen's intent by adopting the language of the rule, and leave clarification to the only appropriate opportunity — when a case on point comes squarely before it. In adopting the language of Rule 41(A) (1), the Supreme Court did speak through the Rule, and in doing so, it accepted the draftsmen's intent that the Siegfried-Cero-Beckner rule of interpretation be put aside.

Conclusion

The Brookman decision is a misinterpretation of the intent and purpose of Rule 41(A); it is an unnecessary throwback to the pre-Rule past. Rule 41(A) has changed the law with respect to voluntary dismissals, and for good reason. No longer is there any need to impose a judicial gloss upon the language of the savings statute, a gloss which makes some voluntary dismissals more "voluntary" than others, and which makes the application of the statute turn upon a subtlety with which even the Supreme Court has had difficulty. If Rule 41(A) is read free of the Siegfried-Cero-Beckner gloss it will achieve uniformity and consistency in application, and will accomplish the goals thought desirable in Beckner. It will curb the taking of voluntary dismissals, and the taking of such dismissals will be subject to the statutes of limitation.32 But if the gloss is not lifted from it, its application will

32 At 18 Ohio St. 2d 40, 247 N.E.2d 303, the Beckner court said:

It should be pointed out that we are not here concerned with Section 2323.05(A), Revised Code, which clearly grants a plaintiff authority to dismiss his action without prejudice at any time prior to its final submission to the jury or court. However, the prosecution of new proceedings on a cause so dismissed is governed by the applicable statute of limitations and may be barred thereby except under the circumstances heretofore discussed.

The view urged here does not exempt "the prosecution of new proceedings on a cause so dismissed" from the "applicable statute of limitations"; it merely puts the first voluntary dismissal by notice taken after the running of the statute within the protective language of the savings statute. It must be remembered that all concede that such a dismissal is "otherwise than upon the merits"; the quibble is whether or not such a dismissal is a "failure" otherwise than upon the merits. The view that it is such a

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be exceptional in some cases rather than uniform in all, and its achievement will not be substantially greater than it would be without the gloss. All that would be gained would be the denial of even one voluntary dismissal in a small number of cases. That small gain is not worth the corresponding loss of uniformity and consistency in the application of the rule. The first voluntary dismissal by notice pursuant to Rule 41(A) is a failure otherwise than upon the merits and, under the provisions of the Ohio Revised Code, section 2305.19, plaintiff may refile his action within one year of the date of such failure.

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failure does no violence to the meaning of the word "fail"; it simply gives it a broader and more acceptable meaning. See, e.g., BLACK'S LAW DICTIONARY, 4th ed. (1951) which gives the primary definition of "fail" as "fault, negligence, or refusal," and the primary definition of "failure" as "abandonment or defeat." Surely, a voluntary dismissal is no more than a refusal to go forward, or an abandonment of the initial prosecution.