

7-1-1976

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Recommended Citation

Henry A. Lopez-Aguilar, *Expanded Right to Voluntary Dismissal Upheld*, 30 U. Miami L. Rev. 1092 (1976)
Available at: <https://repository.law.miami.edu/umlr/vol30/iss4/14>

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It should be noted that there is "a societal interest in providing a speedy trial which exists separate from . . . the interests of the accused."⁴³ Society's interest stems from the backlog increase from delay in bringing cases to trial, the opportunity for those released on bail to commit other crimes, the temptation for the accused to jump bail and escape, and the detrimental effect on rehabilitation from the delay between arrest and punishment.⁴⁴ It is suggested that these interests are not served by the present status of speedy trial case law. Perhaps a solution which would take into account the interests of both society and the accused can be found. However, any change which would enhance the rights of the accused is doubtful in light of the "general indifference to the rights of those accused of crime exhibited by the Supreme Court under the leadership of Chief Justice Burger"⁴⁵ The end result is that the interests of both society and the accused will suffer.

JAMES E. PANNY

Expanded Right to Voluntary Dismissal Upheld

In the noted case, the Florida Supreme Court held that the right to take a voluntary dismissal is absolute and can be had even after the judge has granted defendant's motion for a directed verdict. The author, after reviewing the history and case law on voluntary dismissals, concludes that although the decision was a correct one in light of the Florida Rule of Civil Procedure 1.420 (a)(1), the purpose of the rule would be better served if it were revised so as to put greater limitations on the availability of a voluntary dismissal by a plaintiff.

Petitioner and her husband brought suit against respondents and the Insurance Company of North America, to recover damages resulting from an automobile accident. At the charge conference,

is apparent in murder cases, such as MacDonald's, where there is no statute of limitations. 18 U.S.C. § 3281 (1970) reads: "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939."

43. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

44. *Id.* at 519-20.

45. Rudstein, *supra* note 7, at 58.

while the jury was in recess, the trial court granted respondents' motion for a directed verdict on petitioner's claim for loss of consortium.¹ Petitioner then sought to "take a voluntary nonsuit" on this claim. The trial court permitted her "to take a voluntary non-dismissal," and submitted only the claim of her husband to the jury.² Subsequently, petition again instituted suit against the respondents for loss of consortium. Respondents moved to dismiss by raising the defense of *res judicata*. The trial court granted the motion and dismissed the suit with prejudice. The District Court of Appeal, First District, affirmed on the ground that the suit was barred by the doctrine of *res judicata*.³ The Supreme Court of Florida, on conflict certiorari review,⁴ *held*, quashed and remanded: The plaintiff's right to take a nonsuit or voluntary dismissal, pursuant to Florida Rule of Civil Procedure 1.420(a)(1), is absolute, and such dismissal does not constitute *res judicata* even when taken after the trial court had announced, out of the jury's presence,⁵ that a defendant's motion for a directed verdict was granted. *Fears v. Lunsford*, 314 So. 2d 578 (Fla. 1975).⁶

Voluntary dismissals, currently provided for by Florida Rule of Civil Procedure 1.420 (a)(1), have had a torturous and rather confusing development in Florida law. Part of this confusion may be attributed to the terminology used by the courts, which has not

1. Although not entirely clear, it appears from the record that the court granted the motion, and that, thereafter, the plaintiff announced that he was taking a voluntary dismissal. See Record of Trial on Dec. 8, 1972. *But see* Respondent's Brief at 3-4. See also Petitioner's Brief, *Fears v. Lunsford*, 314 So. 2d 578 (Fla. 1975) at 2-4.

2. Petitioner's Brief at 2-4.

3. *Fears v. Lunsford*, 295 So. 2d 323 (Fla. 1st Dist. 1974).

4. The supreme court found conflict between the majority opinion of the District Court of Appeal, First District, in the instant case, and prior decisions of the District Court of Appeal, Fourth District, in *Meyer v. Contemporary Broad. Co.*, 207 So. 2d 325 (Fla. 4th Dist. 1968) and *Rich Motors, Inc. v. Loyd Cole Produce Express, Inc.*, 244 So. 2d 526 (Fla. 4th Dist. 1970).

5. Although the supreme court did not elaborate on the significance of the trial court's decision to grant a directed verdict being made out of the jury's presence, it seems that in light of *Meyer v. Contemporary Broad. Co.*, 207 So. 2d 325 (Fla. 4th Dist. 1968), this fact may be quite significant. See note 34 *infra*.

6. It appears from the briefs submitted by counsel to both the district court of appeal and the supreme court that the correct basis for reversal was first brought forth by Judge McCord in his dissenting opinion in the district court of appeal. Prior to Judge McCord's dissent, neither petitioner nor respondent had argued Florida Rule of Civil Procedure 1.420(a)(1). It appears that petitioner's argument in the district court of appeal was addressed to the propriety of the defense of *res judicata* and the dismissal of the complaint with prejudice. See Respondent's Brief at 13.

always distinguished between a voluntary dismissal and a voluntary nonsuit.⁷

At early common law, a plaintiff had an absolute right to terminate his litigation at any stage of the proceedings before the verdict was read.⁸ Florida, by statute, recognized this right as early as 1828, but limited it by requiring that the nonsuit be taken before the jury retired.⁹

Since an absolute right to nonsuit was generally considered unjustly advantageous to the plaintiff, who could subject the defendant to multiple and expensive lawsuits, the majority of American jurisdictions have either eliminated the right to nonsuit or have limited it to specified stages of the proceedings.¹⁰ In light of this development, and to curb the abuses that had commonly occurred under state procedures,¹¹ Federal Rule of Civil Procedure 41 was

7. The nonsuit at early common law was a dismissal of the plaintiff's action without an adjudication other than the imposition of costs. It did not constitute a bar to a subsequent action on the same cause. The common law nonsuit was recognized in Florida by statute, but subject to certain limitations. *See* note 9 *infra*. In 1954, with the adoption of Florida Rule of Civil Procedure 1.35, the right of a plaintiff to take a voluntary dismissal was established. Thus it appears that the term nonsuit came to be associated with the common law and statutory right to voluntary dismissal of the action, while the term "voluntary dismissal" was associated with that same right as provided in the rules of procedure. Today, however, even with the abolition of nonsuits, practitioners still use the term. This has prompted the Supreme Court of Florida and other Florida courts to hold that a decision of a lower court will not be condemned because it mistakenly refers to a nonsuit instead of a voluntary dismissal, provided that the requirements for a voluntary dismissal have been generally followed and the effect of the nonsuit is the same as that of a voluntary dismissal. *See* *Continental Aviation Corp. v. Southern Bell Tel. & Tel. Co.*, 183 So. 2d 200 (Fla. 1966) and *Peaslee v. Michalski*, 184 So. 2d 497 (Fla. 2d Dist. 1966).

8. For a history of voluntary dismissal and nonsuit at common law, see Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice*, 37 VA. L. REV. 969 (1951).

9. The original statute was the Act of Nov. 23, 1828, § 69-70. This statute, by providing that "[n]o plaintiff shall take a non-suit on trial unless he do so before the jury retire from the bar," had been interpreted to mean that the common law nonsuit did exist in Florida, limited by the requirement that it be taken before the jury retired. *See* *J. Schnarr & Co. v. Virginia-Carolina Chem. Corp.*, 118 Fla. 258, 159 So. 39 (1934). However, Florida Statutes section 54.09 which was the modern version of the 1828 statute, was superseded by the 1962 revision of Florida Rules of Civil Procedure 1.35 (the purpose of which was to remove the use of nonsuits from Florida civil procedure), and was finally repealed in 1967. *See* *Crews v. Dobson*, 177 So. 2d 202 (Fla. 1965).

10. *See* note 27 *infra*.

11. Until the adoption of the Federal Rules of Civil Procedure, federal courts were required under the Conformity Act to apply state procedure on voluntary dismissals in actions at law, though they were not so compelled in suits in equity. Act of June 1, 1872, ch. 255 § 5, 17 Stat. 197, Rev. Stat. § 914 *repealed by* Act of June 25, 1948, ch. 646 § 39, 62 Stat. 992. *See* *Carnegie Nat'l Bank v. City of Wolf Point*, 110 F.2d 569, 572 (9th Cir. 1940). State

promulgated in 1938, severely limiting the common law nonsuit in federal courts.¹² Under this federal rule the right to take a voluntary dismissal is limited to the period before the adverse party has served an answer or filed a motion for summary judgment.¹³

In 1954, when the Florida Rules of Civil Procedure were adopted, those sections of rule 1.35 concerning voluntary dismissal were virtually identical to the federal rule.¹⁴ Thus, it seemed that Florida intended to restrict its statutory nonsuit. However, included in rule 1.35 (2)(b) were the words "nothing stated herein shall preclude a nonsuit from being taken pursuant to any applicable statute." Those words were thought to preserve Florida's statutory nonsuit, although they were clearly inconsistent with the intent of rule 1.35(a) to limit the use of voluntary dismissal.¹⁵ Thus, although Florida had a rule purporting to limit the common law right to a nonsuit, a plaintiff could still freely avail himself of this right by

practices permitted a plaintiff to voluntarily dismiss his suit at varying stages of the proceedings.

12. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2363 (1971).

13. Rule 41 has been amended eight times since it was originally promulgated in 1938. The amendments, however, have been insignificant. The present text of rule 41(a)(1) is as follows:

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. 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.

14. Fla. R. Civ. P. 1.35(a)(1) (1954) originally provided:

Subject to the provisions hereof, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment or decree, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal shall be without prejudice, except that a dismissal shall operate as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this State an action based on or including the same claim.

(emphasis added).

15. See *Hardee v. Gordon Thompson Chevrolet, Inc.*, 154 So. 2d 174, 177 (Fla. 1st Dist. 1963); *Welgoss v. End*, 112 So. 2d 390 (Fla. 3d Dist. 1959); *Ramsey v. Aranson*, 99 So. 2d 643 (Fla. 3d Dist. 1957). See also Note, *Florida's Unique Dismissal-The Non-suit*, 13 U. FLA. L. REV. 105 (1960), for a discussion of the nonsuit prior to the 1962 revision of rule 1.35.

invoking rule 1.35(2)(b).¹⁶

To further compound the confusion, in 1962 the Florida rules were amended, and the clause concerning nonsuits was omitted without explanation. Thus, the courts were left with the problem of determining whether the omission was meant to eliminate the statutory nonsuit. The problem was finally resolved in 1965 when the Supreme Court of Florida held, in *Crews v. Dobson*,¹⁷ that nonsuits had been abolished. However, shortly thereafter, the Florida rules were again revised, altering the substance of the voluntary nonsuit by extending the absolute right to take one voluntary dismissal to any time prior to the retirement of the jury.¹⁸ Thus, although *Crews* effectively abolished *statutory* nonsuits in Florida, the 1965 revision to rule 1.35 created a voluntary dismissal similar to the old nonsuit, though more limited in scope, with respect to actions at law tried by a jury.¹⁹ The changes made in 1965 have been carried over to rule 1.420 (a)(1) with only minor additions.²⁰

Thus, subject to certain limitations,²¹ a plaintiff, under rule

16. See sources cited in note 15 *supra*.

17. 177 So. 2d 202 (Fla. 1965), *aff'g* 164 So. 2d 252 (Fla. 1st Dist. 1964).

18. The 1965 revision of rule 1.35(a)(1), *effective* January, 1966, reads as follows:

Except in actions wherein property has been seized or is in the custody of the court, an action may be dismissed by the plaintiff without leave of court (i) by serving a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served, or if such motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. 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 served by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(emphasis added).

19. Indeed, it appears that the new rule actually accomplished an extension of the *concept* of nonsuit by specifying the plaintiff's right to take a voluntary dismissal "before submission of a nonjury case to the court for decision" This language of the rule appears to extend the practice so that it is now available in actions at law *without a jury*, and in suits in equity where it had never existed before. For a discussion of cases which substantiate the view that Florida Statutes section 54.09, the nonsuit statute, by its reference to a jury, impliedly limited nonsuit to actions at law with a jury, and precluded its use in suits in equity, see Comment, *Florida's Unique Dismissal-The Non-suit*, 13 U. FLA. L. REV. 105 (1960).

20. In 1967, a sentence was added at the end of the first paragraph stating "if a lis pendens has been filed in the action, a notice or stipulation of dismissal under this paragraph shall be recorded and cancels the lis pendens without the necessity of an order of court." The purpose of this was to automatically cancel any lis pendens filed in action.

21. Florida Rule of Civil Procedure 1.420(a)(2) provides that a voluntary dismissal is not

1.420(a)(1) as it presently stands, may obtain dismissal of an action without order of court by serving or by stating on the record, during trial, his notice of dismissal. Such notice of dismissal may be given at any time before a hearing on a motion for summary judgment, or if the motion has been denied, before the jury retires or before the case is submitted to the judge.²² A voluntary dismissal taken pursuant to this rule serves to divest the court of jurisdiction;²³ however, some conflict does exist as to the exact time at which the court loses jurisdiction.²⁴

Under the present Florida rule, it has been held that the plaintiff's right to a voluntary dismissal is an absolute right,²⁵ and can

available to a plaintiff as a matter of right where a counterclaim has been served on plaintiff prior to the notice of dismissal. In those cases, a dismissal may be obtained only by court order, and such order will not be granted over defendant's objection unless the counterclaim can remain standing for independent adjudication. Furthermore, even in the absence of a counterclaim, a voluntary dismissal cannot be obtained as of right when "property has been seized or is in the custody of the court," FLA. R. CIV. P. 1.420(a)(1); or when important matters such as the status of seized lands, the title to said lands and the deposit held by the court are left unresolved. *O'Sullivan v. City of Deerfield Beach*, 232 So. 2d 33, 34-35 (Fla. 4th Dist. 1970). Similarly, in an action for divorce, plaintiff-husband could not voluntarily dismiss as of right after defendant-wife had moved for temporary custody of the minor children of the parties. *Cooper v. Cooper*, 194 So. 2d 278 (Fla. 2d Dist. 1967).

A somewhat different situation was presented in *Hutchins v. City of Hialeah*, 196 So. 2d 741 (Fla. 1967). In that case, the Supreme Court of Florida held it improper to allow a plaintiff to take a voluntary dismissal with prejudice against a codefendant when the action might result in a higher award of compensatory damages against the remaining defendant. In *Hutchins* a police officer and his employer, the City of Hialeah, were sued for assault and battery. The trial court awarded damages of \$1,227.25 against the officer and \$32,627.25 against the city. A new trial was granted on the basis that the city could not be assessed compensatory damages in excess of those assessed against the active tortfeasor. At the new trial, the plaintiff voluntarily dismissed the officer and obtained a verdict for \$15,000 against the city. The supreme court held it was error to have allowed dismissal of the police officer.

22. FLA. R. CIV. P. 1.420(a)(1)(i). Two other types of voluntary dismissal are also provided for in the rule: Subsection (a)(1)(ii) provides for voluntary dismissal by stipulation signed by all of the parties dismissing the action, and 1.420(a)(2) provides for voluntary dismissal by order of court "upon such terms and condition as the court deems proper."

23. The trial court loses jurisdiction to proceed further once a notice of dismissal has been timely filed. *Gate City, Inc. v. Arnold Constr. Co.*, 243 So. 2d 637 (Fla. 4th Dist. 1971).

24. Compare *Rich Motors, Inc. v. Loyd Cole Produce Express, Inc.*, 244 So. 2d 526 (Fla. 4th Dist. 1970), where a voluntary dismissal served to terminate the action and divest the court of jurisdiction upon its filing, thus preventing a plaintiff from reinstating his case after having taken a voluntary dismissal, with *Cooper v. Carroll*, 239 So. 2d 511 (Fla. 3d Dist. 1970), where the action was reinstated when plaintiff urged that he had mistakenly dismissed all defendants when he only intended to dismiss one. Thus it appears that while the *Rich Motors* court assumed that loss of jurisdiction occurred immediately upon the filing of a voluntary dismissal, the *Cooper* court was of the opinion that where the plaintiff claimed that he had made a mistake, the court retained jurisdiction to review the filing.

25. See *Briner v. Gilmore*, 229 So. 2d 874 (Fla. 2d Dist. 1969); *Dreher v. American Fire*

be taken without prejudice in the absence of a prior voluntary dismissal.²⁶ The problem represented by the decision in the *Fears* case concerns the question of how far the plaintiff may go with his suit before he loses that absolute right.²⁷ Although the rule facially seems quite specific as to the point in time at which the plaintiff loses the right, situations have arisen which create difficulties in interpreting the rule. For example, the District Court of Appeal, Third District, has interpreted the language "before submission of a nonjury case to the court for decision" to permit a plaintiff to take a voluntary dismissal at any time prior to resting his case.²⁸ Similarly, the District Court of Appeal, Fourth District, permitted a voluntary dismissal after judgment, when the trial court on rehearing had set aside the judgment entered dismissing the complaint with prejudice and giving the plaintiffs 30 days to amend their complaint.²⁹ The Fourth District has also held that voluntary dismissal is appropriate

& Cas. Co., 220 So. 2d 435 (Fla. 4th Dist. 1969); *Meyer v. Contemporary Broad. Co.*, 207 So. 2d 245 (Fla. 2d Dist. 1968).

26. A second voluntary dismissal of the suit operates as an adjudication on the merits which bars a future action on the same claim. See *Briner v. Gilmore*, 229 So. 2d 874 (Fla. 2d Dist. 1969); *Rome v. Silver*, 166 So. 2d 238 (Fla. 3d Dist. 1964). See also *Massey, Hoffman, and Linder, Civil Procedure, Eleventh Survey of Florida Law*, 28 U. MIAMI L. REV. 257, 299 (1974). However, some question as to this provision has been raised. The two-dismissal rule is only applicable where the dismissal of the prior action was voluntarily made by plaintiff. Thus institution of a third suit is not foreclosed where one of the earlier dismissals was by order of court. For a discussion of this question in relation to the analogous case under the federal rules, see *Barns, 1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 282 n.20 (1963).

A further point of controversy has been whether a plaintiff's right to a voluntary dismissal is limited to a dismissal of the whole action, or whether plaintiff may exercise his right to voluntary dismissal of a claim, or of all claims, as against some, but not all, defendants. See *Crump v. Gold House Rest., Inc.*, 96 So. 2d 215 (Fla. 1957); *Cooper v. Carroll*, 239 So. 2d 511 (Fla. 3d Dist. 1970); *Shannon v. McBride*, 105 So. 2d 16 (Fla. 2d Dist. 1958).

27. Consideration of this problem has led the Florida courts to recognize the tremendous advantages given the plaintiff with the right to nonsuit; thus, the courts have been constantly in the process of restricting and qualifying such right. For a general discussion on this subject see Note, *Florida's Unique Dismissal—The Non-suit*, 13 U. FLA. L. REV. 105, 122 (1960).

Because of the possible injustice to the defendants, the majority of American jurisdictions have limited the right to nonsuit at least to specified stages of the proceedings. See, e.g., *Consumers' Power Co. v. McNichol*, 287 F. 529 (6th Cir. 1923) (before the defendant begins presentation of his defense); *St. Louis, T.M. & S. Ry. v. Ingram*, 118 Ark. 377, 176 S.W. 692 (1915) (before submission of the case to jury); *Denver & R.G.R.R. v. Paonia Ditch Co.*, 49 Colo. 281, 112 P. 692 (1911) (before trial); *Gildea v. Lund*, 131 Md. 385, 102 A. 467 (1917) (before arguments on the facts have begun).

28. *Modular Constr., Inc. v. Owen*, 270 So. 2d 753 (Fla. 3d Dist. 1972). It appears from the opinion that plaintiff's attorney had called all his witnesses, but in response to the question of whether he had rested his case, he replied "No". *Id.* at 754.

29. *City of Sunrise v. Florida State Bd. of Pub. Instr.*, 273 So. 2d 10 (Fla. 4th Dist. 1973).

if filed prior to a date designated by the court at the close of final argument for the filing of memoranda by counsel substantiating their positions.³⁰ Also, where a plaintiff filed his voluntary dismissal after the trial judge had dismissed his complaint with leave to amend, the supreme court, reversing both the trial court and the appellate court, held that the dismissal of the complaint with leave to amend was interlocutory and thus did not cut off plaintiff's right to file a voluntary dismissal within the time granted to amend the dismissed complaint.³¹

In *Fears*, it clearly appears that the jury had not been advised of the court's decision to grant a directed verdict in favor of the defendant.³² Thus, *Fears* stands for the proposition that in a jury case, the plaintiff has an absolute right to take a voluntary dismissal even after the trial judge has, in the absence of the jury, announced his decision to grant a defendant's motion for a directed verdict.

In reaching its decision, the supreme court adopted the dissenting opinion of Judge McCord at the district court of appeal level and cited, in support, four recent district court of appeal cases which involved the same question. The earliest of these cases is *Meyer v. Contemporary Broadcasting Co.*³³ which presented a factual situation quite similar to that in *Fears*. *Meyer* involved a suit for breach of an employment contract. The case was tried before a jury and at the close of the plaintiff's case, the defendant moved for a directed verdict. The trial judge indicated, during argument on defendant's motion, and in the absence of the jury,³⁴ that he would grant the

30. *Dreher v. American Fire & Cas. Co.*, 220 So. 2d 435 (Fla. 4th Dist. 1969). Although final argument had been completed, the case had not been "submitted to the court" since the memoranda to be filed were "useful aids to [the judge's] ultimate decision." *Id.* at 436.

31. *Hibbard v. State Road Dep't*, 225 So. 2d 901 (Fla. 1969).

32. See note 34 *infra*. It may be argued that a plaintiff's notice of dismissal would not be timely and "before retirement of the jury" if it is given after the court has instructed the jury that it was directing a verdict for the defendant. Indeed Judge McCord in his dissenting opinion in the district court of appeal in *Fears* stated: "It appears that the point of no return is reached when the judge announces the directed verdict to the jury. Up to that time, plaintiff can take a voluntary dismissal." *Fears v. Lunsford*, 295 So. 2d 323, 325 (Fla. 1st Dist. 1974) (McCord, J., dissenting), *quashed*, 314 So. 2d 578 (Fla. 1975).

33. 207 So. 2d 325 (Fla. 4th Dist. 1968).

34. The importance of the fact that the jury was absent when the trial court granted defendant's motion for a directed verdict is apparent from the appellate court's statement that "the announcement by the plaintiff of the voluntary dismissal of the suit *prior to any announcement by the court to the jury* that it was directing a verdict for the defendant was timely . . . and was before retirement of the jury." *Id.* at 327 (emphasis added). Thus it appears that if the motion had been granted in the jury's presence, a voluntary dismissal announced thereafter would be untimely.

motion. Plaintiff immediately announced that he was taking a voluntary dismissal of the suit. The trial judge stated that he had already ruled on the motion, refused to allow the dismissal, called the jury back in and announced that "the court here and now direct [sic] a verdict for the defendant."³⁵ The District Court of Appeal, Fourth District, reversed. In reaching its decision, the court discussed the meaning of the phrases "without order of court" and "before retirement of the jury," as they appear in rule 1.420 (a) (1).³⁶ As to the latter phrase, the court stated that "a jury has not retired until they are in the jury room and can only emerge therefrom or have anything brought therein under the direction of the Court."³⁷ As to the former phrase, the court stated that it gave the plaintiff an absolute right to control the continuation of the litigation until the hearing on a motion for summary judgment, the retirement of the jury, or the submission of a nonjury case to the court for decision.³⁸ Thus, it appears that the situation facing the First District in *Fears* had already been decided by the Fourth District with the opposite result.³⁹

Continuing its analysis, the supreme court then considered *Rich Motors, Inc. v. Loyd Cole Produce Express, Inc.*⁴⁰ In *Rich Motors* the plaintiff took a voluntary dismissal in the face of an adverse evidentiary ruling by the trial court. Later, the plaintiff sought, and obtained, a reinstatement of the same action. On appeal, the District Court of Appeal, Fourth District, held that the voluntary dismissal pursuant to rule 1.420 (a)(1) served to terminate the action and to divest the court of jurisdiction.⁴¹ Accordingly, the trial court was without jurisdiction to grant a rehearing on the dismissal or to reinstate the original action.⁴² The court relied on

35. *Id.* at 327.

36. *Id.*

37. *Id.*

38. *Id.*

39. Indeed the petitioner in *Fears* relied on *Meyer* as a "red cow" case on the same facts and reaching a "diametrically opposite conclusion" from the one reached by the First District in *Fears*. See Petitioner's Brief on the Merits for Certiorari at 6, 7, *Fears v. Lunsford*, 314 So. 2d 578 (Fla. 1975). This situation was recognized by the supreme court in finding conflict between the First and Fourth Districts for the purpose of granting certiorari in *Fears*. See 314 So. 2d at 578-9.

40. 244 So. 2d 526 (Fla. 4th Dist. 1970).

41. *Id.* at 528.

42. Although it is not mentioned in the court's opinion, it appears that the plaintiff in *Rich Motors* was precluded from bringing a new action because the statute of limitations had run. *But see* Petitioner's Brief on the Merits on Certiorari at 9, *Fears v. Lunsford*, 314 So. 2d 578 (Fla. 1975).

Meyer in reaching its decision, inasmuch as that case had held that rule 1.420 (a)(1) gave plaintiff absolute control over continuation of the litigation.⁴³ Although the factual pattern in *Rich Motors* is distinguishable from the one in *Fears*, both the *Rich Motors* and the *Meyer* cases show the liberal interpretation given by the Fourth District to rule 1.420 (a)(1).

The position of the District Court of Appeal, Third District, concerning voluntary dismissals is exemplified by *Modular Construction, Inc. v. Owen*,⁴⁴ which was cited in a footnote to the *Fears* opinion.⁴⁵ In *Modular Construction*, the District Court of Appeal, Third District, stated that until the plaintiff had rested his case, it could not be said that he had submitted his case to the court for a decision, and thus his motion for voluntary dismissal was timely.⁴⁶ Although this case can be distinguished from *Fears* on the basis that it did not involve a jury trial, it presents the liberal construction given rule 1.420 (a)(1) by the Third District.

Finally, the supreme court in *Fears v. Lunsford* pointed out that subsequent to the First District decision in *Fears*, a different panel of that same court reached a directly contrary result in *DeMaupassant v. Evans*.⁴⁷ There, the First District upheld the trial court's decision allowing the plaintiff to take a voluntary dismissal after the defendant had made his closing arguments and during plaintiff's rebuttal.⁴⁸

Thus, when the *Fears* case came before the supreme court, the district courts of appeal had already laid sufficient foundation to support the result reached therein. Indeed, a contrary result in *Fears* would have meant a direct overruling of the *Meyer* case discussed above. In addition, more confusion would have been injected into an area already plagued with more than its share of instability. Thus it appears that the *Fears* decision is entirely consistent with the expansive construction given by the courts to the time limitations for voluntary dismissals under rule 1.420(a)(1). Furthermore,

43. 244 So. 2d at 527.

44. 270 So. 2d 753 (Fla. 3d Dist. 1972).

45. 314 So. 2d at 579 n.3. The court cited *Modular Construction* in support of the propositions that the plaintiff's right to take a voluntary dismissal is absolute and that once plaintiff exercises his right, "[t]he only remaining action required by the court contemplated by the rule would be to advise the jury thereof in a jury case." *Id.* at 579.

46. 270 So. 2d at 754.

47. 300 So. 2d 313 (Fla. 1st Dist. 1974).

48. *Id.* at 314.

the supreme court decision is also supported by the general principle of statutory construction that, to the extent that a remedial statute is in derogation of a common law right, it is to be liberally construed in favor of that right.

However, although *Fears* seems to have been correctly decided in light of the wording of the rule and its prior judicial construction, Justice England, in a well reasoned dissenting opinion, urged an examination of the rule's purpose rather than merely its words. In Justice England's view, the rule contemplates that a plaintiff may voluntarily dismiss his case before the jury retires to resolve questions of fact, or before the court rules against him on questions of law.⁴⁹ He stated:

For purposes of allowing the plaintiff a second day in court on the same cause of action, I see no distinction between commencement of a summary judgment hearing and the "submission of a nonjury case to the court for decision," on the one hand, and the granting of a motion for directed verdict on the other. The latter event, which is not expressly mentioned in the Rule, even more clearly than the former events, which are mentioned in the Rule, marks a point which separates the fact-finding process from the courts' domain of pronouncing the law.⁵⁰

In his dissenting opinion, Justice England expressed his approval of the policy reasons given by the district court of appeal in *Fears* for denying the plaintiff a new trial after the motion for directed verdict was granted.⁵¹ There the First District stated that the purpose of the rules of procedure is "to expedite . . . disposition of cases with fairness and justice to all parties."⁵² The court had emphasized that:

The case for the application of [res judicata] is even stronger here, for the issue of loss of consortium was actually litigated up to the point when the trial court directed a verdict in favor of [defendant] on that issue. . . . To allow [the plaintiff] to relitigate this issue when the [defendants] have already had a rul-

49. 314 So. 2d at 580 (England, J., dissenting).

50. *Id.* In support of his comparison of a motion for summary judgment with a motion for a directed verdict, Justice England, citing *Chowning v. Pierce*, 174 So. 2d 42 (Fla. 3d Dist. 1965), stated that both these motions require the same judicial evaluation of factual allegations. He also considered that when a motion for directed verdict is granted, the litigation of the issues involved is ended as a matter of law. 314 So. 2d at 580 n.3 (England, J., dissenting).

51. 314 So. 2d at 580.

52. *Fears v. Lunsford*, 295 So. 2d 323, 325 (Fla. 1st Dist. 1974).

ing favorable to them would be to defeat justice and prolong litigation.⁵³

Thus Justice England concurred with the lower court's restrictive interpretation of the rule. Indeed, his proposed analogy between summary judgment and directed verdict seems convincing, and his policy argument is in line with the modern trend in the federal courts and other states to restrict the use of voluntary dismissals.⁵⁴ However, the fact remains that the majority decision was correct in light of the language of the rule and its previous interpretations.

Justice Overton in his concurring opinion in *Fears*⁵⁵ confronts the dilemma in a more direct manner than does Justice England. Justice Overton recognized the problems involved with the present rule, and the inequitable results which it may produce. He stated:

I do not agree with the rule of procedure as it is written, because of the type of result that has occurred in the instant case. However, this is what was intended by the rule. If we desire to make a change we should do so in the rule.⁵⁶

Another avenue of approach not noted by the dissent, but supporting its position, is suggested by Florida Rule of Civil Procedure 1.480(a), which states: "The order directing a verdict is effective without any assent of the jury." Thus, it appears that once the judge has granted the directed verdict the case is concluded, and the remaining practice of instructing the jury is a mere formality, which cannot be taken as extending the plaintiff's time for taking a voluntary dismissal.

It seems that *Fears*, although decided in conformity with the present language of the rule and modern judicial precedent in the Florida district courts of appeal, is not a happy solution to the problem of voluntary dismissals in this state, especially when viewed in light of the modern trend in the federal courts and most state courts to restrict the use of voluntary dismissals.⁵⁷ Even some of the judges that have supported the present permissive trend in Florida have felt compelled to do so solely by reason of the language of the rule. Thus, as Judge McCord stated in his dissenting opinion:

53. *Id.*

54. See note 27 *supra*. See also WRIGHT & MILLER, *supra* note 12, § 2363.

55. 314 So. 2d at 579-80 (Overton, J., concurring).

56. *Id.*

57. For a comprehensive discussion of the status of voluntary dismissals in the federal courts, see WRIGHT & MILLER, *supra* note 12, at §§ 2361-76.

While I do not consider that a plaintiff should have the right to take a voluntary dismissal after the trial judge has announced, out of the jury's presence that a defendant's motion for directed verdict will be granted, I am of the opinion that Rule 1.420 (a) (1) . . . gives him that right.⁵⁸

Similarly, the court in *DeMaupassant* stated:

We cannot be critical of plaintiff's attorney for taking tactical advantage of the rule. However, as the rule was applied in the case *sub judice* it is easy to see how an injustice might result [W]e feel that the rule should be changed to prevent voluntary dismissals, without order of court, of co-defendants at the end of a trial after they have had an opportunity to "heap it on" the remaining defendant or defendants.⁵⁹

The same critical attitude is present among some of the justices on the Supreme Court of Florida, as shown by the opinions of Justices England and Overton.⁶⁰

The object of the Florida Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action."⁶¹ The achievement of this purpose seems best served by allowing the plaintiff only a very brief period of unrestrained control over the litigation. Once the expense of preparation for trial has begun to mount, and the interests of the other party are adversely affected, a dismissal should be permitted only in the exercise of sound judicial discretion, and then only when tempered by such terms and conditions as the court deems just.

Furthermore, the circumstances which led to the recognition of the common law nonsuit no longer exist in modern day practice.⁶² Difficulties in communication and transportation may have justified the procedure at early common law in order to allow a plaintiff to appear and present his case. However, today, where such difficulties no longer exist, this procedural device has been converted into an instrument of unfair advantage to the plaintiff, who can discon-

58. *Fears v. Lunsford*, 295 So. 2d 323, 325 (Fla. 1st Dist 1974) (McCord, J., dissenting), *quashed* 314 So. 2d 578 (Fla. 1975).

59. *DeMaupassant v. Evans*, 300 So. 2d 313, 314 (Fla. 1st Dist. 1974).

60. See text accompanying notes 50 and 56 *supra*.

61. FLA. R. CIV. P. 1.010.

62. See generally Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20 (1920); Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice*, 37 VA. L. REV. 969 (1951).

tinue his action in order to present a better case whenever he faces an adverse ruling.

The voluntary dismissal rule, as it now exists in Florida, is a highly questionable procedural remedy which may frequently result in wasted time, effort, and expense. For example, in a case in which the defendant has called his witnesses from great distances, a jury has been impanelled, and witnesses' testimony taken, the plaintiff, sensing a verdict about to be directed against him, may dismiss the action only to bring the suit again at a later date. This situation presents "an outrageous imposition not only on the defendant, but also on the court."⁶³

To solve the problem, it appears that rather than giving a restrictive construction to the wording of the present rule as proposed by Justice England in his dissenting opinion, a change in the wording of the rule is in order. As discussed above, the necessity for change has been recognized by several members of the judiciary in Florida.⁶⁴ One solution would be to delete rule 1.420 (a)(1) while retaining rule 1.420 (a)(2).⁶⁵ This would abolish voluntary dismissals as of right, while leaving the question of whether such voluntary dismissal should be allowed within the sound discretion of the trial court.⁶⁶ Alternatively, the wording of rule 1.420 (a)(1) could be changed to conform to the present language of federal rule 41 (a) (1).⁶⁷ This would limit the time within which a plaintiff may dismiss as a matter of right to any time before service by the adversary party

63. *McCann v. Bentley Stores Corp.*, 34 F. Supp. 234 (W.D. Mo. 1940).

64. See text accompanying notes 58-60 *supra*.

65. FLA. R. CIV. P. 1.420 (a)(2) deals with voluntary dismissals by order of court. It states in part that: "Except as provided in subdivision (a)(1) of this rule, an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper." Thus, eliminating subdivision (a)(1) would leave the entire subject of voluntary dismissal to the discretion of the court, which could consider the equities involved on a case by case basis, and render an appropriate order. The order of dismissal could obviously be conditioned on the plaintiff compensating the defendant for reasonable expenses incurred.

66. This solution has been suggested in regard to FED. R. CIV. P. 41 (a)(1), in an attempt to eliminate problems of construction of the language of the federal rule. See Note, 1962 DUKE L.J. 285, 289; 63 YALE L.J. 738, 743 (1954).

67. This solution, however, will import into Florida practice the problems of language construction which have been encountered in federal practice in connection with federal rule 41(a)(1). See Note, 1962 DUKE L.J. 285. It should be noted that the 1962 version of rule 1.420 (a)(1), then rule 1.35 (a)(1), was essentially identical to federal rule 41(a)(1). Compare note 14 with note 13 *supra*.

of an answer or a motion for summary judgment, whichever comes first.⁶⁸ Another avenue of approach would be to change the language of rule 1.420 (a)(1) so as to deny voluntary dismissals as of right after the court has had an opportunity to consider the merits of the controversy.⁶⁹ This change would obviously vest some discretion in the trial court but would not completely abolish the plaintiff's right to a voluntary dismissal.⁷⁰

Any of the suggested changes will relieve the injustice that the present Florida rule now works on defendants. Each would also expedite disposition of cases and eliminate the needless expenditures of time, effort, and resources associated with the relitigation of issues that the present rule encourages. The purpose of the Florida Rules of Civil Procedure, "to secure the just, speedy and inexpensive determination of every action"⁷¹ would thus be better served.

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68. FED. R. CIV. P. 41 (a)(1).

69. This solution has been suggested in connection with proposed amendments to FED. R. CIV. P. 41 (a)(1) in 1962 *DUKE L.J.* 285. That article presents a good summary of the problems involved in applying the federal rule in its present language and the policy reasons behind the suggested change.

70. See 1962 *DUKE L.J.* 285.

71. *FLA. R. CIV. P.* 1.010.