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# Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975)

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# CASE COMMENTS

**Civil Procedure**—VOLUNTARY DISMISSAL—PLAINTIFF'S RIGHT TO TAKE VOLUNTARY DISMISSAL IS ABSOLUTE; OR PLAINTIFF GETS A SECOND CHANCE.—*Fears v. Lunsford*, 314 So. 2d 578 (Fla. 1975).

Patricia Fears and her husband sought to recover damages arising out of a traffic accident.[1] Mrs. Fears claimed, among other things, loss of consortium. During the charging conference, the trial court judge granted defendant's motion for a directed verdict on that claim and ordered it stricken from the record.[2] Mrs. Fears then sought, and the trial court permitted, a voluntary dismissal of that claim.[3] The remaining claims went to the jury, and the Fears recovered $10,000.[4]

Several months later,[5] Mrs. Fears filed another suit, again claiming loss of consortium. The appellees raised the defense of res judicata and moved to dismiss. The trial court granted the motion, dismissing the suit with prejudice. Mrs. Fears appealed. The First District Court of Appeal affirmed the trial court's dismissal.[6] It reasoned that the granting of the motion for directed verdict in the earlier suit constituted prior adjudication of the claim, and concluded that appellant's second suit was therefore barred by the doctrine of res judicata. There was one dissent.[7]

The Supreme Court of Florida granted conflict certiorari.[8] The court quashed the decision of the district court and remanded the case, basing its decision on Rule 1.420(a)(1) of the Florida Rules of Civil Procedure.[9] The court held that, in a jury trial under that rule,

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1. This action was tried in the Circuit Court of Jackson County, Fourteenth Judicial Circuit, on December 8, 1972, case number 5–72–96. Brief for Respondents at 2, Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975).

2. Brief for Respondents at 3, Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975).

3. *Id.* Mrs. Fears asked for a "voluntary nonsuit." Nonsuits are no longer recognized in Florida. The term is now synonymous with voluntary dismissal. The trial court granted a "voluntary non-dismissal." Voluntary non-dismissals are unknown in Florida. It was suggested in the briefs that the use of this term may have been an error of the court reporter. The discrepancy of terms was not made an issue in this case. It was assumed that a voluntary dismissal was requested and granted.

4. Brief for Respondents at 2, Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975). *See also* Appendix to Brief for Respondents at A–3, Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975).

5. Brief for Respondents at 5, Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975).

6. Fears v. Lunsford, 295 So. 2d 323, 325 (Fla. 1st Dist. Ct. App. 1974).

7. *Id. See* note 15 *infra.*

8. Fears v. Lunsford, 314 So. 2d 578 (Fla. 1975). The court granted certiorari because of conflict with prior decisions of the Fourth District Court of Appeal. *Id.*

9. *Id.* FLA. R. CIV. P. 1.420(a)(1) states:

> Except in actions wherein property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of court (i) by serving or during trial, by stating on the record, a notice of dismissal at any time before

"the plaintiff's right to take a nonsuit or voluntary dismissal is absolute"[10] prior to the retirement of the jury.

At English common law, the plaintiff had an absolute right to take a nonsuit at any time prior to the rendering of a verdict by the jury.[11] Although the common law nonsuit in the United States generally followed the English rule,[12] the rule has been limited by statute in many jurisdictions.[13] The Florida rule allows the plaintiff to voluntarily dismiss the action without order of the court until such time as the jury retires to deliberate.[14] The issue in this case was whether the granting of a motion for a directed verdict, prior to retirement of the jury, terminated the plaintiff's right to a voluntary dismissal and constituted a final adjudication of the claim.

In concluding that it does not terminate this right, the *Fears* court quoted with approval the entire dissent from the opinion of the First District Court.[15] The dissent concluded that "the point of no return

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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 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. 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.

10. 314 So. 2d at 579.

11. Head, *The History and Development of Nonsuit,* 27 W. VA. L.Q. 20, 22 & nn.9 & 16 (1921).

12. *Id.* at 25.

13. Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice,* 37 VA. L. REV. 969 (1951).

14. *See* note 9 *supra* for text of the rule. Note that the voluntary dismissal is *with prejudice* if the plaintiff has previously dismissed an action based on or including the same claim.

15. 314 So. 2d at 578–79. Judge McCord's dissent was quoted in the opinion of the supreme court as follows:

> 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 a directed verdict will be granted, I am of the opinion that Rule 1.420(a)(1) Florida Rules of Civil Procedure, 30 F.S.A., gives him that right. The trial judge in this case also apparently considered appellant had such right as he granted [her] motion for voluntary dismissal. . . . This case was tried before a jury and appellant stated on the record [her] notice of dismissal before retirement of the jury. Thus, in my opinion the previous announcement by the court that it would grant the motion for directed verdict is not res judicata to this action. See Meyer v. Contemporary Broadcasting Company, Fla. App., 207 So. 2d 325 (1968). 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.

is reached when the judge announces the directed verdict to the jury. Up to that time, plaintiff can take a voluntary dismissal."[16] Based on the dissent and two Florida appellate court decisions,[17] the court determined that the rule specifically and clearly makes the plaintiff's right to take a voluntary dismissal prior to retirement of the jury absolute.[18]

The court could have considered whether the granting of a motion for directed verdict is a determinative adjudication on the merits. Justice England's dissent addressed this issue.[19] The purpose of Rule 1.420(a)(1), Justice England observed, is to grant "plaintiffs the right to dismiss their own lawsuits before their claims have been adjudicated . . . ."[20] Justice England stated that the rule contemplates the plaintiff having this right until "the jury retires to resolve facts *or before the judge rules against him on points of law.*"[21] The majority of the court, however, did not address this point; it looked instead to the isolated language of the rule.[22] If it is accepted that the purpose of Rule 1.420(a)(1) is to grant plaintiffs the right to voluntarily dismiss an action prior to adjudication on the merits, then the court should have considered whether the granting of a motion for a directed verdict is such an adjudication.

Rule 1.480 of the Florida Rules of Civil Procedure governs motions for directed verdicts.[23] This rule states, "The order directing a verdict

16. *Id.* at 579. This conclusion was based on only one case, Meyer v. Contemporary Broadcasting Co., 207 So. 2d 325 (Fla. 4th Dist. Ct. App. 1968). *Meyer* was a suit for breach of an employment contract. At the close of the plaintiff's case, the defendent moved for a directed verdict. The judge indicated his intention to grant the motion; the plaintiff immediately announced that he was taking a voluntary dismissal under Rule 1.35 of the Florida Rules of Civil Procedure [the applicable version of Rule 1.35 was virtually identical to the current Rule 1.420]. The trial judge refused to allow the dismissal and entered the directed verdict for the defendant. On appeal, the district court found that the judge had erred and held that the plaintiff's right to voluntarily dismiss is absolute until retirement of the jury.

17. DeMaupassant v. Evans, 300 So. 2d 313 (Fla. 1st Dist. Ct. App. 1974) (during closing arguments, the plaintiff voluntarily dismissed two of three defendants); Rich Motors, Inc. v. Loyd Cole Produce Express, Inc., 244 So. 2d 526 (Fla. 4th Dist. Ct. App. 1970) (party taking voluntary dismissal at outset of trial is not entitled to rehearing on the dismissal or reinstatement of the action). The *DeMaupassant* court urged a rule change to prevent voluntary dismissals, without order of the court, of co-defendants at the end of the trial. 300 So. 2d at 314.

18. 314 So. 2d at 579.

19. *Id.* at 580.

20. *Id.*

21. *Id.* (footnote omitted) (emphasis added).

22. *See* note 9 *supra.*

23. FLA. R. CIV. P. 1.480 states in pertinent part:

(a) Effect. A party who moves for a directed verdict at the close of the evidence offered by the adverse party may offer evidence in the event the motion

is effective without any assent of the jury."[24] The granting of a motion for a directed verdict means that as a matter of law no lawful view of the evidence could sustain the claim of a party.[25] In his dissent, Justice England pointed out that "[f]or 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."[26] That this is true becomes clear when the function of a summary judgment is compared to that of a directed verdict. In order for a summary judgment to be granted, there must be no genuine issue of material fact, and the moving party must be entitled to a summary judgment as a matter of law.[27] A summary judgment is a final adjudication on the merits. Similarly, a directed verdict takes the issue out of the fact-finding realm of the jury. Viewed in its entirety, Rule 1.480 provides for the granting of a directed verdict against a party where the court determines that the party's claim is unsupported by the evidence presented. A summary judgment, like a directed verdict, is a ruling that, as a matter of law, the facts do not support a party's claim.

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is denied without having reserved the right to do so and to the same extent as if the motion had not been made. The denial of a motion for a directed verdict shall not operate to discharge the jury. A motion for a directed verdict shall state the specific grounds therefor. The order directing a verdict is effective without any assent of the jury.

24. *Id.*

25. *See, e.g.*, Hurst v. Krinzman, 237 So. 2d 333, 334 (Fla. 3d Dist. Ct. App. 1970) (A negligence action in which the court stated: "Established by Florida decisions so numerous as to preclude a need for their citation, are the rules that a trial court should not direct a verdict for defendant unless it is clear that there is no evidence whatever adduced that could in law support a verdict for plaintiff . . . ."); Little v. Publix Supermarkets, Inc., 234 So. 2d 132, 133 (Fla. 4th Dist. Ct. App. 1970) (A negligence action wherein the court said that a directed verdict "should never be granted unless the evidence is of such a nature that under no view which the jury might lawfully take of it, favorable to the adverse party, could a verdict for the latter be upheld."); Landry v. Sterling Apartments, Inc., 231 So. 2d 225 (Fla. 4th Dist. Ct. App. 1969) (A negligence action in which the court stated that a directed verdict should be granted only where no evidence is presented on which a jury could lawfully return a verdict.); Bittson v. Steinman, 210 So. 2d 30, 32 (Fla. 3d Dist. Ct. App. 1968) (An action for breach of contract wherein the court said that a "trial court should not direct a verdict unless the evidence is such that a verdict in favor of the non-moving party could not be supported in law.").

26. 314 So. 2d at 580 (footnote omitted).

27. FLA. R. CIV. P. 1.510(c); Graham v. First Marion Bank, 237 So. 2d 793, 793–94 (Fla. 1st Dist. Ct. App. 1970) (An action against the bank for wrongfully dishonoring a check in which the court concluded that a summary judgment must be rendered "if the pleadings, depositions, answers to interrogatories and admissions . . . if any, show 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.").

It seems clear that the granting of a motion for a directed verdict is an adjudication upon merits of a claim, which should preclude a plaintiff from later taking a voluntary dismissal. Other jurisdictions with similar rules of procedure, however, have not agreed on this interpretation. Some courts have held that a plaintiff has a right to voluntarily dismiss a claim after the court has granted a motion for directed verdict, but before the jury has retired.[28] Others have denied the plaintiff such a right.[29] Conflicting decisions from other jurisdictions are of little help in resolving the problem presented by *Fears*.

The judicial policy announced in *Fears* bears careful examination. First, the plaintiff is allowed to discover the entire defense of the defendant and is therefore able to prepare a stronger case before litigating a second time. This occurs, as in *Fears*, when the plaintiff hears all the evidence, discovers any weaknesses in his case, voluntarily dismisses the action, and then sues again. Second, the plaintiff is allowed to change theories before relitigating. Third, the judicial process is slowed: busy courts are burdened with relitigation. Last, expense to the litigants in time, costs, and fees is increased.

One tangential point should be made concerning the *Fears* decision. In *Fears*, a verdict was directed and a voluntary dismissal was taken on only one of several issues. The advisory committee notes pertaining to Rule 1.420(a) indicate that the rule was not intended to be available for this purpose.[30] Though the Florida courts have not recognized the advisory committee's construction of this rule, it would nevertheless appear that the Supreme Court of Florida may have inappropriately applied the rule in the *Fears* case.

Both the concurring and dissenting opinions in *Fears* indicate that Rule 1.420(a) should be amended to preclude results similar to the one reached.[31] The rule should be amended to include a provision terminating the plaintiff's absolute right to a voluntary dismissal upon

28. *See* Meyer v. Contemporary Broadcasting Co., 207 So. 2d 325 (Fla. 4th Dist. Ct. App. 1968); Eason v. Northern Ind. Pub. Serv. Co., 114 N.E.2d 887 (Ind. Ct. App. 1953); Rush v. Barnhill, 255 N.W. 491 (Iowa 1934); Lykens v. Jarrett, 17 S.E.2d 328 (W. Va. 1941).

29. *See* Hattiesburg Butane Gas Co. v. Griffin, 206 So. 2d 845 (Miss. 1968); O'Brien v. Southern Bell Tel. & Tel. Co., 259 S.W.2d 554 (Tenn. Ct. App. 1952); Roberts v. Morgan, 502 S.W.2d 31 (Tex. Civ. App. 1973); *In re* Frye's Estate, 88 P.2d 576 (Wash. 1939).

30. FLA. R. CIV. P. 1.420, Committee Note. The committee note provides that "[s]ubdivision (a) applies to the entire action and does not authorize dismissal of some, but not all, parties or claims."

31. 314 So. 2d at 579–80. The process to be followed when seeking to amend a rule of procedure is detailed in *In re* The Florida Bar, 276 So. 2d 467 (Fla. 1972). While the present rule does not clearly mandate the result reached in *Fears*, a revision of the rule could preclude it.

a granting by the judge of a motion for directed verdict.[32] Until such final determination by a judge, the plaintiff's right to a voluntary dismissal should remain intact. To allow Rule 1.420(a)(1) to remain unchanged gives the plaintiff a second chance at the expense of the hapless defendant.

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**Criminal Law**—GUILTY PLEAS—FACTUAL BASIS DETERMINATION NOT MANDATORY WHEN A COURT ACCEPTS A PLEA OF GUILTY OR NOLO CONTENDERE.—*Williams v. State*, 316 So. 2d 267 (Fla. 1975).

John Henry Williams was arrested for various narcotics violations and charged by information with 10 drug related offenses. At first appearance he entered pleas of not guilty and requested a trial by jury. Williams was also charged by information with possession of a firearm by a convicted felon. A jury trial on one of the drug charges resulted in a verdict of guilty. Pursuant to plea negotiations, Williams pleaded guilty to the remaining drug charges and was to receive a 5-year prison sentence for the jury conviction, and another 5-year sentence on one of the other charges, which two sentences were to be served consecutively, followed by a 5-year probation period for the remaining charges. The state agreed not to prosecute the charge of possession of a firearm by a convicted felon.[1] The trial court, however, imposed an additional 5-year term of imprisonment on a drug charge, and inadvertently adjudged Williams guilty on the firearm charge, with

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32. The following is a suggested amendment to Rule 1.420(a)(1):

(1) By Parties. Except in actions wherein property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of the court (i) by serving or during trial, by stating on the record, 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 granting of a motion for directed verdict*, or 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 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. 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.

1. Williams v. State, 316 So. 2d 303 (Fla. 2d Dist. Ct. App. 1974). [Note: A discrepancy as to the details of charges and pleadings exists between the brief of John Henry Williams filed in the Supreme Court of Florida, and the opinion of the Second District