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# Voluntary Dismissals in Illinois – a Critical Review

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*The author examines the law governing a plaintiff's right to voluntarily dismiss its cause of action. In addition to reviewing the controlling cases, statutes and rules, he opines that the right to non-suit should be limited.*

At common law, a plaintiff was allowed to voluntarily dismiss its cause of action at any time prior to a final decision by the judge or jury.[1] In 1933 the Civil Practice Act was amended to allow a voluntary dismissal "any time before trial or hearing begins."[2]

This right to dismiss has been described by the Illinois Supreme Court as an "unfettered" right subject only to a few qualifications.[3] This means a trial court does not have discretion to deny a plaintiff's motion to dismiss if the prerequisites are met. Further, the right to a voluntary dismissal becomes very powerful, and even subject to abuse, when combined with the statutory right of a plaintiff to refile a case within one year after a voluntary dismissal even if the original statute of limitations has already expired.[4]

The voluntary dismissal statute provides as follows: "The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause."[5] Therefore, the statute automatically allows a voluntary dismissal when 1) notice is given, 2) costs are paid, 3) no trial or hearing has begun, and 4) there is no previously filed motion that could result in a final disposition of the case.

Additionally, Illinois courts have ruled that if a supreme court rule contradicts or limits the right to dismiss, the rule will control.[6] These qualifications upon the right to voluntarily dismiss a case are examined in more detail below.

## I. Defining When a Trial or Hearing Begins

In *Kahle v John Deere Company*,[7] the Illinois Supreme Court addressed when a trial or hearing begins for the purposes of a voluntary dismissal. In *Kahle*, the court ruled on motions in limine on the day of trial. After the motions were ruled upon and before the jury had been selected, the plaintiff voluntarily dismissed his case.

The court held that motions in limine are pre-trial motions and where the jury had not been sworn or selected and no opening statement had been made, trial had not yet begun.[8]

Further, the "hearing" referred to in the voluntary dismissal statute is a hearing involving the parties' rights where evidence is taken on the merits.[9]

The use of the word "hearing" in the statute does not apply to pre-trial "hearings" on motions such as motions in limine. Rather, it applies to hearings on the merits where there is a non-jury proceeding.[10] Therefore, even in a case where the court ruled on over 100 motions and where the parties all referred to the case as being "on trial," the plaintiff was allowed to voluntarily dismiss the case because jury selection had not yet begun.[11]

**II. The Impact of Notice and Costs on Non-suits**

The statute requires that the defendant be given notice of the motion and that costs be tendered. Though these seem to be black and white requirements, in practice the Illinois Supreme Court has found that where no prejudice has resulted from the failure to meet these requirements, a voluntary dismissal is still proper.

For example, in *Mizell v Passo*,[12] the plaintiff gave no prior written notice of the motion to dismiss and did not tender costs. The trial court granted the defendant a short recess to prepare to argue against the motion. Despite the lack of statutory notice or a tender of costs, the trial court ruled against the defendant and dismissed the case. The supreme court ruled that because there was no prejudice to the defendant (he was given a chance to argue the motion and costs were actually awarded though not properly tendered), the trial court properly granted the plaintiff's motion.[13] Therefore, where a court has dismissed a case, the dismissal will not be vacated unless there was prejudice to the defendant.

In 2000, the fifth district remanded a case for improper notice where dismissal had been granted.[14] However, the fifth district did not address *Mizell* and therefore its ruling in this area is suspect. In 2002, the first district followed *Mizell* in *Valdovinos v Luna-Manalac Medical Center, Ltd*[15] when it held that lack of notice and failure to tender costs did not prejudice the defendants.

Unless there is a pending dispositive motion, violation of a supreme court rule, or trial has already begun, it is difficult to imagine how a defendant could show prejudice for the failure to provide notice or tender costs. It is only when one of these other issues is present that a non-suit would not be granted. Therefore, the failure to meet the notice or tender of costs requirements will not preclude the eventual non-suit of a case. At most, a court will require new notice and payment of the costs.

**III. Previously Filed Motions that Could Result in Final Disposition**

Section (b) of the voluntary dismissal statute provides: "The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause."[16] This section codified the Illinois Supreme Court decisions in *Gibellina v Handley*[17] and *Mizell*. These cases held that where there was a previously

filed motion by the defendant that could result in the final disposition of the case, the trial court could rule upon that motion.

In the four years prior to *Gibellina* in 1989, over 70 cases were heard by the appellate courts dealing with voluntary dismissals.[18] Many dealt with summary judgment motions. To prevent overburdening already over crowded dockets, the *Gibellina* court ruled that "the trial court may hear and decide a motion which has been filed *prior to* a section 2-1009 motion when that motion, if favorably ruled on by the court, could result in a final disposition of the case."[19] *Mizell* clarified that the trial court has discretion to decide whether or not to rule on a previously filed dispositive motion, such as a summary judgment motion. Therefore a trial court is not required to hear such a motion.[20]

On November 20, 2003, the Illinois Supreme Court decided *Smith v Central Illinois Regional Airport*.[21] In *Smith*, the defendants filed motions to dismiss pursuant to section 2-615 of the Code of Civil Procedure.[22] The trial court dismissed two counts with prejudice and ordered the third count dismissed and gave the plaintiff 60 days to file an amended count.[23] Before the 60 days expired, the plaintiff moved for a voluntary dismissal.[24] The supreme court properly ruled that because the plaintiff had the right to amend the third count, there was no final dismissal under section 2-615, and therefore the plaintiff could dismiss the count.[25]

However, the *Smith* court inserted some troubling language in its opinion when it wrote in dicta that section 2-615 motions to dismiss are generally not dispositive because courts will often grant leave to plead over.[26] While this language was not needed to resolve the issue in the case, it opens the door for future claimants to argue that a section 2-615 motion to dismiss is not a potentially dispositive motion and therefore that the claimant is automatically entitled to a voluntary dismissal. Of course, a section 2-615 motion is *potentially* dispositive and falls squarely within the ambit of the statute. Therefore it is likely that future courts will have to deal with this potential conflict between the *Smith* dicta and the statute.

This author believes the correct ruling would be that a previously filed 2-615 motion is *potentially* dispositive and could, at the court's discretion under the statute, be heard prior to the motion to voluntarily dismiss. If the 2-615 motion is granted and the case is dismissed with prejudice, there would be no voluntary dismissal. If the 2-615 motion is granted only in part or with conditions, or is denied, then the claimant could voluntarily dismiss the case.

**IV. The Power Under Supreme Court Rule to Limit the Right to Dismiss**

In *O'Connell v St. Francis Hospital*,[27] the plaintiff originally brought suit on the day the statute of limitations expired. The plaintiff then served the defendant eight months later. The defendant moved to dismiss with prejudice under Supreme Court Rule 103(b) due to the plaintiff's lack of diligence. The Illinois Supreme Court wrote as follows:

The Illinois Constitution clearly empowers this court to promulgate procedural rules to facilitate the judiciary in the discharge of its constitutional duties….Because procedural rule-making is concurrent on occasion, we have sought to reconcile, where possible, conflicts between rules of this court and legislative enactments….While we have favored reconciliation, we have not hesitated to strike down those procedural legislative enactments which unduly infringe upon our constitutional rule-making authority. "[W]here a rule of this court on a matter within the court's authority and a statute on the same subject conflict, *the rule will prevail*."[28]

The court then ruled the non-suit statute impermissibly infringed upon the court's "constitutional authority to regulate the judicial system of Illinois" because it regulated the dismissal of cases.[29]

Under *O'Connell*, there is an argument that the entire non-suit statute is invalid. The court wrote "[n]othing is more critical to the judicial function than the administration of justice without delay."[30] The court also wrote "insofar as section 2-1009 directs the circuit court to dismiss a case, it unduly infringes upon the fundamental, exclusive authority of the judiciary to render judgments."[31]

Of course a right to a voluntary dismissal is a right to delay a case until it is refiled. Further, section 2-1009 absolutely directs the circuit courts to dismiss cases. Therefore under the dicta in *O'Connell*, it appears there is no right to a voluntary dismissal because such a right infringes upon the judiciary's authority to regulate cases.

Despite this dicta, the court has not ruled that the statutory right to a non-suit is an unconstitutional infringement upon the court's authority in regulating the judicial system. Rather, the court has held that *O'Connell* should be "read and applied narrowly" to those situations where a statutory enactment directly conflicts with a specific court rule.[32]

The potential implications of *O'Connell* for action by the Illinois Supreme Court are very important. Under *O'Connell*, the court's rulemaking ability "trumps" statutory attempts to regulate the judiciary's exercise of its constitutional powers. Therefore, some future supreme court could arguably limit a plaintiff's right to a voluntary dismissal as long as the reason for the rule has to do with the administration of justice and regulating cases before the courts.

## V. Non-suits and Arbitration

Arbitration, which is governed by Supreme Court Rules 86 thru 95, is an area of law not contemplated when the non-suit statute was drafted. Not surprisingly, then, courts struggle with voluntary non-suit in the arbitration setting.

***When the plaintiff rejects the award.*** In *Perez v Leibowitz*,[33] after years of discovery and pretrial activity, the case went to mandatory arbitration and the award was rejected by a defendant. The plaintiff then voluntarily dismissed the case and the appellate court

upheld the dismissal.[34] According to this ruling arbitration is not trial and cases can still be dismissed after an arbitration hearing.

However, in *George v Ospalik*[35] the third district distinguished *Perez* by noting that the *Perez* defendant had rejected the arbitration award and therefore the case was ready for trial. In *George,* the third district noted that Supreme Court Rule 93(a) allows a party to reject an award by paying $200 and then proceeding to trial.[36] The court ruled a voluntary dismissal would result in a conflict with Rule 93(a) because in *George* the plaintiffs did not properly reject the arbitration award by paying $200. The real effect of this ruling is to make plaintiffs jump through the extra hoop of rejecting an award and paying $200 prior to taking a dismissal.

***When the plaintiff fails to show.*** If a plaintiff does not attend an arbitration and judgment enters pursuant to Supreme Court Rule 91, the absence is deemed to constitute a consent to the entry of judgment on the arbitration award.[37] In *Arnett v Young,*[38] the first district held that Rule 91 entirely curtails the right to voluntarily dismiss one's case if the arbitration hearing is not attended.

However, in *Lewis v Collinsville Unit No 10 School Dist*[39] the fifth district limited *Arnett.* In *Lewis,* the plaintiff did not appear at the arbitration because she previously filed a motion for non-suit. At the arbitration hearing the defendant asked for a dismissal with prejudice because of the plaintiff's absence.[40] The arbitration panel entered no award and made no findings.[41] Distinguishing the *Arnett* ruling, the *Lewis* court ruled the plaintiff could seek a voluntary dismissal because the trial court could not enter judgment where no award had actually been entered.[42]

In this author's opinion, the *Lewis* court wanted to allow the plaintiff to dismiss her case because she filed her motion to dismiss prior to the hearing. Therefore, the court created a limited exception to the *Arnett* ruling by holding that if no arbitration award was entered, the plaintiff could still dismiss her case.

***Courts walk the fine line.*** The arbitration cases are trying to walk a fine line. They recognize that arbitration proceedings are not trials as contemplated by the statute and common law. However, all the reasons for not allowing a voluntary non-suit after trial has begun apply to an arbitration hearing. The parties will often have expended large amounts of resources and evidence will have been presented on the merits. Allowing a party to non-suit its case after an arbitration hearing flies in the face of judicial economy, which is behind curtailment of the "abuses" of the statute and the creation of the arbitration system.

Courts are generally ruling that supreme court rules regulating arbitration proceedings prohibit voluntary dismissals while arbitration is proceeding, even though arbitration rules do not mention the right to dismiss. In any event, under current law, once arbitration is over, the plaintiff still has the right to reject the award and then dismiss the case.

**VI. Using Rule 219 to Curb Abuse of Voluntary Dismissals After Discovery**

The right to refile a case within one year of a voluntary dismissal has led through the years to what the Illinois Supreme Court has called "myriad abusive uses of the voluntary dismissal statute."[43] Some of these abuses included going through the entire discovery process and then dismissing a suit on the eve of trial, as occurred in *Gibellina*.[44]

One of the ways the "abusive" use of voluntary dismissals can be avoided is by a court's use of Supreme Court Rule 219, which regulates discovery. Where discovery abuse is involved, Rule 219(e) provides that a "party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), and misconduct, and orders entered in prior litigation involving a party."

Additionally, a court granting a voluntary dismissal has the power to order the plaintiff to pay the defendant reasonable expenses incurred while defending the action.[45] However, these expenses do not include attorneys' fees.

In *Morrison v Wagner*[46] the Illinois Supreme Court ruled that the right to dismiss is not abrogated by Rule 219. However, there are consequences to such a dismissal. When a plaintiff refiles a case, any prior discovery misconduct can (and should) be taken into account by the new court.[47] The Committee Comments to Rule 219 state as follow: "the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred." Therefore, when a plaintiff refiles a case, the trial court has the authority at that time to impose discovery sanctions upon the plaintiff.

Despite the use of the word "shall," Rule 219 does not require the court to reimpose any sanctions that were entered against a party in the earlier case.[48] "Rather, the misconduct of a party in the original action and any sanctions entered against him therein are merely facts to be considered by the court in the refiled action when it determines what witnesses and evidence will be permitted."[49]

Further, Rule 219(e) cannot be used to automatically make a plaintiff pay a defendant's discovery expenses. There first needs to be a finding by the court of some discovery misconduct as was discussed in *Scattered Corp v Midwest Clearing Corp*.[50] In *Scattered Corp*, the trial court ordered the plaintiff to pay the defendant over $135,000 in expenses other than attorneys' fees. The appellate court reversed, holding the award of $135,756.11 was improper because there was no finding of discovery misconduct and the plaintiff merely dismissed the case as part of its strategy.[51]

From the Rule 219 committee comments and cases, it is unclear whether the court hearing a refiled case has the authority to impose monetary sanctions such as attorneys' fees upon a party that abused the discovery process in prior litigation. Additionally, if the new case is filed not by the prior petitioner, but by the prior respondent, as in a divorce proceeding, it is even more questionable whether the court would have the authority to impose discovery sanctions for conduct which occurred in the prior case.

It is important to note that Rule 219 deals only with discovery. Though in many cases the "harm" to the defendant that occurs before a voluntary dismissal stems from discovery misconduct, there are other situations where the "harm" to the defendant occurs elsewhere prior to trial. For example, in cases where a temporary restraining order is obtained by the defendant against the plaintiff, a non-suit can result in harm to the defendant. Also, in divorce actions, adverse interim orders regarding temporary child support or child custody can be avoided by dismissing a case.[52]

**VII. Potential for Abuse in Divorce**

Divorce actions differ from most other litigation in that they are not subject to a statute of limitations. If a petitioner voluntarily dismisses a divorce, the petitioner can bring the divorce action at any later time and not just one year after the dismissal. Divorce actions are also unusual in that they can be brought by either party to the action. Therefore, if a petitioner dismisses a divorce, either the petitioner or the respondent in the prior divorce can bring a subsequent divorce action.

Because of these uncommon characteristics of divorce litigation, there is a great potential for abuse. For instance, a petitioner who obtained an unfavorable ruling from a custody evaluator may choose to dismiss the case and refile. Or where the respondent has incurred substantial attorneys' fees and may move for contribution from the spouse under the fee sharing statute, the petitioner could dismiss, and the respondent would be solely responsible for the fees. The same action can be taken where the judge has granted temporary support to the respondent.

In these situations, the petitioner can shift the burden to the respondent. The easy solution is for the respondent to file a counter-petition for divorce. However, there are some respondents who for religious or other reasons do not wish to file a counter-petition. In those cases, the respondent may one day find an unpleasant surprise when the petitioner dismisses his or her cause of action.

**VIII. Additional Limitations on Voluntary Dismissals**

A plaintiff, by its own actions, may also foreclose a later attempt to voluntarily dismiss a case. Where the elements of judicial estoppel, equitable estoppel, or waiver are met, a court can prevent a plaintiff from obtaining a voluntary dismissal.[53] Additionally, "section 2-1009 does not automatically immunize a plaintiff against the bar of *res judicata* or any other legitimate defenses a defendant may assert in response to the refiling of voluntarily dismissed counts."[54]

Therefore, where one cause of action is mandatorily joined to another, a voluntary dismissal of one of the causes will not allow it to be refiled at a later date.[55] Also, because the defenses of collateral estoppel and res judicata apply, these doctrines will serve to mitigate some of the damage to respondents when orders have issued in prior cases. For example, this could prove valuable in determining the amount of a temporary support award in a later-filed divorce action.

## IX. Conclusion

If the "myriad abusive uses of the voluntary dismissal statute" continue, some future legislature may draft legislation to curb these "abuses" or again write the one-year refiling provision out of the statute.[56] Perhaps a future Illinois Supreme Court will draft additional rules that limit voluntary dismissals in divorce or arbitration. In any event, the right to voluntary dismissal is unlikely to be expanded in the future.

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1. *Gibellina v Handley*, 127 Ill 2d 122, 132, 535 NE2d 858, 863 (1989).

2. Id.

3. *Morrison v Wagner*, 191 Ill 2d 162, 165, 729 NE2d 486, 488 (2000).

4. 735 ILCS 5/13-217. The one-year refiling provision was eliminated by the Civil Justice Reform Amendments of 1995, but those changes were declared unconstitutional as a whole by *Best v Taylor Machine Works*, 179 Ill 2d 367, 689 NE2d 1057 (1997).

5. 735 ILCS 5/2-1009(a).

6. *O'Connell v St. Francis Hospital*, 112 Ill 2d 273, 281, 492 NE2d 1322 (1986).

7. 104 Ill 2d 302, 472 NE2d 787 (1984).

8. Id at 309, 472 NE2d at 790.

9. Id at 309-10, 472 NE2d at 790.

10. Id.

11. *Valdovinos v Luna-Manalac Medical Center, Ltd*, 328 Ill App 3d 255, 266, 764 NE2d 1264, 1272 (1st D 2002), quoting *Kahle* at 309, 472 NE2d 787.

12. 147 Ill 2d 420, 590 NE2d 449 (1992).

13. Id at 428-29, 590 NE2d at 452-53

14. *Lewis v Collinsville Unit No 10 School Dist*, 311 Ill App 3d 1021, 1027-28, 725 NE2d 801, 806 (5th D 2000).

15. *Valdovinos* at 267-68, 764 NE2d 1264, 1274 (1st D 2002).

16. 735 ILCS 5/2-1009(b).

17. *Gibellina* at 137, 535 NE2d at 866.

18. Id, 535 NE2d at 865.

19. Id.

20. *Mizell* at 425, 590 NE2d at 451.

21. 207 Ill 2d 578, 802 NE2d 250 (2003).

22. Id at 580, 802 NE2d at 252.

23. Id at 581, 802 NE2d at 252.

24. Id.

25. Id at 588, 802 NE2d at 256.

26. Id at 584, 802 NE2d at 254.

27. 112 Ill 2d 273, 492 NE2d 1322 (1986).

28. Citations omitted. *O'Connell* at 281, 492 NE2d at 1326, quoting *People v Cox*, 82 Ill 2d at 274, 412 NE2d at 545 (1980) (emphasis supplied).

29. Id.

30. Id at 282, 492 NE2d at 1326.

31. Id at 283, 492 NE2d at 1327.

32. *Gibellina* at 133, 535 NE2d at 864.

33. 215 Ill App 3d 900, 576 NE2d 156 (1st D 1991).

34. Id.

35. 299 Ill App 3d 888, 890, 702 NE2d 982, 983 (3d D 1998).

36. Id.

37. *Arnett v Young*, 269 Ill App 3d 858, 646 NE2d 1265 (1st D 1995).

38. Id.

39. 311 Ill App 3d 1021, 1024, 725 NE2d 801, 803-04 (5th D 2000).

40. Id at 1023, 725 NE2d at 802.

41. Id, 725 NE2d at 803.

42. Id at 1027, 725 NE2d at 806.

43. *Gibellina* at 136, 535 NE2d at 865.

44. Id.

45. *Vicencio v Lincoln-Way Builders, Inc*, 204 Ill 2d 295, 297, 789 NE2d 290, 307 (2003). Committee Comments to S Ct Rule 219 (e).

46. 191 Ill 2d 162, 166, 729 NE2d 486, 488 (2000).

47. Id at 167, 729 NE2d at 489.

48. *Smith v PACE, a Suburban Bus Division of the RTA*, 323 Ill App 3d 1067, 1074, 758 NE2d 353, 360 (1st D 2001).

49. Id.

50. 299 Ill App 3d 653, 659, 702 NE2d 167, 171 (1st D 1998); see also *In re Marriage of Webb*, 333 Ill App 3d 1104, 777 NE2d 443 (2d D 2002).

51. *Scattered Corp*, 299 Ill App 3d 653, at 660, 702 NE2d at 172.

52. See *In re Marriage of Manns*, 222 Ill App 3d 338, 342, 583 NE2d 707, 710 (5th D 1991) where a petitioner avoided an order requiring her to pay $111,191.

53. See *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 259 Ill App 3d 231, 238-241, 631 NE2d 1302, 1308-1310 (1st D 1994).

54. *Zuniga v Dwyer*, 323 Ill App 3d 508, 512, 752 NE2d 491, 495 (1st D 2001); see also *Rein v David A. Noyes & Co*, 172 Ill 2d 325, 665 NE2d 1199 (1996).

55. *Zuniga* at 512-513, 752 NE2d at 495-96. A plaintiff can choose to dismiss all or only part of a cause of action. For example, in *Zuniga* the plaintiff in a personal injury action maintained part of the action, but dismissed the loss of consortium claim. If a counterclaim or counter-petition has been filed, the counterclaim is not dismissed. 735 ILCS 5/2-1009(d). Only the movant's claim can be dismissed by a motion for voluntary dismissal.

56. As is noted in footnote 4, this provision was eliminated by the 1995 "tort reform" legislation, which was in turn invalidated by *Best v Taylor Machine Works*, 179 Ill 2d 367, 689 NE2d 1057 (1997).

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