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PRACTICE AND PROCEDURE - VOLUNTARY NONSUIT - TREATMENT UNDER MICHIGAN COURT RULES

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PRACTICE AND PROCEDURE — VOLUNTARY NONSUIT — TREATMENT UNDER MICHIGAN COURT RULES — In an action for malpractice, after the plaintiff had rested, defendant moved for a directed verdict. In response to an inquiry as to how he intended to rule upon the motion, the trial judge indicated that he would have to grant the motion. Plaintiff then moved for a voluntary nonsuit, but the judge proceeded to direct a verdict for the defendant. He later granted a motion to vacate the order directing a verdict and to set aside the verdict and judgment. Defendant sought mandamus to compel the trial judge to reinstate the directed verdict and judgment. *Held*, that under the Michigan Court Rules [1] the plaintiff had a right to a voluntary nonsuit.[2] *Wicks v. Wayne Circuit Judge*, 299 Mich. 252, 300 N. W. 75 (1941).[3]

At common law, as a general rule, the plaintiff was entitled to take a nonsuit at any time before the verdict, although some courts limited this to the time when the jury retired to consider its verdict.[4] The time within which the

[1] "Plaintiff may at any time, upon notice to the defendant or his attorney, and on the payment of costs, discontinue his suit by order filed in the court, except where recoupment or set-off is asserted by the defendant; and except where a defendant shall have entered upon his defense in open court, unless with the consent of the defendant." Michigan Court Rule No. 38, § 1 (1938).

[2] Conceivably the court might have decided that upon the argument on the motion for a directed verdict the defendant would be taken to have entered upon his defense, but it has consistently held that such a stage is not reached until a defendant has put in his evidence on the merits. Mintz v. Soule, 200 Mich. 9, 166 N. W. 491 (1918); Slowke v. Altermatt, 293 Mich. 360, 292 N. W. 330 (1940).

[3] See also Slowke v. Altermatt, 293 Mich. 360, 292 N. W. 330 (1940).

[4] Barrett v. Virginian Ry., 250 U. S. 473, 39 S. Ct. 540 (1919); Deneen v. Houghton County Street Ry., 150 Mich. 235, 113 N. W. 1126 (1907).

plaintiff can take a voluntary nonsuit, as of right, has been changed a number of times by the Supreme Court through its rule-making power.[5] In 1891 the common-law rule was altered to prohibit a plaintiff from taking a voluntary nonsuit after the jurors had left the jury box to deliberate upon their verdict.[6] Under the 1916 revision, a plaintiff was allowed a voluntary nonsuit at any time upon notice to the defendant and payment of costs, except where a recoupment or set-off was asserted.[7] This right was greatly curtailed by the 1931 rules, which prohibited the dismissal after the answer was filed.[8] The 1933 enactment corresponded to the 1916 rule.[9] The rule now in effect, on which the principal case is based, allows the plaintiff to discontinue [10] at any time before the defendant enters upon his defense,[11] thereby making the court rule correspond to the statutory enactment on the subject.[12] Inasmuch as a voluntary nonsuit is not prejudicial to plaintiff and is not an adjudication on the merits,[13] the result reached under the rule now in effect is an undesirable one. It places the parties to the action upon an unequal footing, for it places the disposition of the case within the uncontrolled discretion of the plaintiff, and this permits a plaintiff to experiment with his action without prejudice to himself and at the expense of the defendant. Fairness to a defendant [14] who has been put to the trouble and expense of preparing his defense to the plaintiff's declaration would seem to require plaintiff to go through to a judgment,[15] without subjecting the defendant to repeated preparation, harassment and expense for which he is not even adequately compensated by the payment of taxable costs. The principal case depicts the undesirable effects of the present rule, viz., the plaintiff is able to determine how the trial judge will rule on the defendant's motion for a directed verdict, and if the prospective ruling is to be for the defendant, the

[5] Michigan Constitution, art. 7, § 5 (1908)..

[6] Michigan Circuit Court Rule No. 65, (1891).

[7] Michigan Circuit Court Rule No. 43, § 1 (1916).

[8] Michigan Court Rule No. 38, § 1 (1931).

[9] Michigan Court Rule No. 38, § 1 (1933). See 16 MICH. ST. B. J. 587 (1937).

[10] "For the purpose under consideration there is no difference between taking a nonsuit and discontinuance by motion." Pear v. Graham, 258 Mich. 161 at 165, 241 N. W. 865 (1932).

[11] See note 1, supra.

[12] Mich. Comp. Laws (1929), § 14335. Until the latest revision of the court rules, there had been a conflict between the provisions of the statute and the court rules, but art. 7, § 5 of the Michigan Constitution of 1908 vests the Supreme Court with rule-making power, and its rule on the subject is controlling. Pear v. Graham, 258 Mich. 161, 241 N. W. 865 (1932).

[13] Deneen v. Houghton County Street Ry., 150 Mich. 235, 113 N. W. 1126 (1907); Nickels v. Hallen, 247 Mich. 291, 225 N. W. 569 (1929).

[14] "It is highly important that the court in the exercise of its discretion should not only see that equal and exact justice is done between litigants, but it is equally important that needless litigation should be speedily determined, and in the trial of cases the court should consider the rights of the defendant as well as those of the plaintiff. . . ." Parks v. Southern Ry., (C. C. A. 4th, 1906) 143 F. 276 at 279.

[15] See MICHIGAN PROCEDURE COMMISSION, FINAL AMENDED REPORT 58 (1929).

plaintiff is able to withdraw his case and doctor it up for future presentation.[16] The Federal Rules of Civil Procedure,[17] models in the procedural field, resolve the problem very conveniently by denying a plaintiff an absolute right to dismiss after defendant files his answer.[18] Thus a voluntary dismissal may be had before the defendant files his answer, but an abuse of the privilege is prevented by limiting such dismissal to an early stage of the proceedings.[19] Such a rule of practice leaves the plaintiff free to obtain a nonsuit at any time before the defendant files his answer in the cause. There is no good reason why, after this stage in the proceedings, the plaintiff should have a right to dismiss, in the absence of some legitimate excuse. Leave to take a nonsuit thereafter would be within the sound discretion of the court, for good cause shown.[20] This places both parties upon an equal footing and still protects the plaintiff in the event of some unforeseeable occurrence, by enabling him to take a nonsuit after the answer is filed for good and sufficient cause shown. It therefore would seem desirable for the Michigan court to adopt the federal rule to replace the court rule now in effect.[21]

[16] "The courts are not organized for the purpose of permitting plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law applicable to the same and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief, and should not be tolerated." Parks v. Southern Ry., (C. C. A. 4th, 1906) 143 F. 276 at 279-280.

[17] Rules of Civil Procedure for the District Courts of the United States (1937).

[18] ". . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action." Federal Rules of Civil Procedure for the District Courts of the United States, Rule 41 (a) (1) (1937).

[19] Indeed, the federal rule has been criticized because it does not go quite far enough. "Guarded as the Rule is, it is subject to criticism, for it would seem to authorize a plaintiff to dismiss where the defendant had not served an answer but had moved for summary judgment." 3 MOORE, FEDERAL PRACTICE 3037-3038, note 12 (1938).

[20] The Court Rules of 1931 specifically provided that the plaintiff could discontinue after an answer was filed upon a showing supported by affidavits. The federal rules have a similar provision as to dismissal after answer filed upon good cause shown. Rule 41 (a) (2). It seems, however, that even in the absence of such provisions in statutes or court rules the court in its discretion can grant the plaintiff's request to discontinue. Tucker v. Immanuel Baptist Church, 119 Kan. 30, 237 P. 654 (1925); Taylor v. Green, 119 Okla. 297, 249 P. 393 (1926).

[21] The provision of the federal rules is somewhat similar to that in the Michigan Court Rule No. 38, § 1 (1931).