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Voluntary Dismissal in Ohio: A Tale of an Ancient Procedure in a Modern World

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VOLUNTARY DISMISSAL IN OHIO: A TALE OF AN ANCIENT PROCEDURE IN A MODERN WORLD

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I. INTRODUCTION

You wake up to a beautiful day; the sun is shining, the birds are singing, and a nice man hands you a paper informing you that you are being sued—cue the ominous music and thunderclouds. You spare no expense and hire the best lawyers for the money. Thousands of dollars are invested in discovery and preparation for trial. It appears you have a fairly solid case—the plaintiff's arguments seem weak—yet, the opposing party seems disinterested in settling. You want to avoid the bad press of a trial, but you have no choice except to continue preparation. Luckily, everything is in place for a good defense.

To your surprise, however, the day before the trial, the plaintiff gives notice of voluntary dismissal.[1] The case is dismissed, the plaintiff has a year to re-file—as long as he or she has no problems with the statute of limitations—and *you* have a stack of attorney bills.[2] Understandably, you are upset. You want answers. Why did the plaintiff drop the case at the last second? Answer: It does not matter, because in Ohio, plaintiffs have an absolute right to voluntarily dismiss anytime before the start of the trial.[3] A plaintiff is only required to file notice before the trial starts.[4]

The defendant is a victim of this rule. The defendant may lose much of his or her preparation for trial and be left without a remedy. Why would Ohio perpetuate a defective system that tolerates such a mismanagement of judicial resources and legal services? Not only is the defendant dispossessed of time and money, but the courts, and by extension, the taxpayers, are also deprived of time and money. Ohio courts are stretched to begin with; why allow another tax on them? The judge's time is precious, and many court dockets are at full capacity. For Ohio to consent to judges

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[1] A number of terms have been used throughout history to describe voluntary dismissal. Many terms have subtle differences, and some have archaic definitions and distinctions. For example, some quotes may refer to "nonsuits" or "discontinuances." For this discussion, the term "voluntary dismissal" is sufficient to encompass these ideas. As the history of voluntary dismissals progressed, the various meanings behind the different terms began to merge. It is beyond the scope of this Note to address all the differences in the definitions and usage. Some commentators have discussed the true meaning of many of these terms. *See* Neil C. Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20, 20-21 (1921).

[2] Think that is harsh? *See* Harvey Aluminum, Inc. v. Am. Cyanamid Co., 203 F.2d 105 (2d Cir. 1953). The plaintiff filed notice of voluntary dismissal in an action for specific performance after several days of testimony created a record of four-hundred-and-twenty pages. *Id.* at 107-08. This is one of the few instances where the court bent the rules and barred the plaintiffs from voluntarily dismissing. *See infra* note 169 and accompanying text.

[3] OHIO R. CIV. P. 41(A)(1)(a) (stating that a plaintiff can voluntarily dismiss all claims without an order of the court by "filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant").

[4] *Id.*

sitting idle because a case was voluntarily dismissed immediately before the trial is poor stewardship. This was not the purpose of the rule.

Modern litigation has evolved radically from the common law era, and these changes need to be taken into account. A considerable workload is completed prior to the commencement of proceedings. This increases the costs for both parties. Voluntary dismissal following such an endeavor of preparation creates an exceedingly harsh consequence. Ohio should adopt a modification of the Federal Rule concerning voluntary dismissal that limits the possibility of abuse while still allowing plaintiffs to dismiss by the discretion of the court.

This Note will demonstrate that a modified Federal Rule is the best rule for voluntary dismissal. First, this Note will survey the history of voluntary dismissal and the progression from the common law in England to the current Federal Rule. Second, this Note will discuss the abuses of the rule in Ohio and the need for change. Third, this Note will dissect the Ohio Rule and compare it alongside the Federal Rule. Fourth, this Note will examine possible alternatives. Finally, this Note will propose why a modification of the Federal Rule is the most practical answer to the abuses of voluntary dismissal.

II. THE HISTORY OF VOLUNTARY DISMISSAL

A. Early Common Law Forerunners

Voluntary dismissal is an ancient civil procedure concept that was born out of early English common law. As early as 1371, the plaintiff had the right to voluntary dismissal.[5] Under the early common law, voluntary dismissal was absolutely unrestricted.[6] Later restrictions limited dismissal to any time prior to the jury rendering its verdict.[7] Although the plaintiff was ordered to pay costs, he or she was not precluded from filing the action again.[8] Under this rule, the plaintiff had ultimate discretion to dismiss his or her case up to the return of the verdict.[9] Moreover, at common law, the plaintiff could—and often did—voluntarily dismiss a cause of action by merely failing to appear for the verdict.[10]

Under common law, this absolute right was not unreasonable, and the plaintiff carried a heavier burden than current plaintiffs. First, he or she did not have the

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[5] Head, *supra* note 1, at 21-22.

[6] *Id.* at 22.

[7] *Id.* Also, in early cases, the plaintiff could voluntarily dismiss even after the verdict had been rendered if the plaintiff did not agree with the damages amount. *Id.* at 23; *see also* Paul M. Lipkin, Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss his Action Without Prejudice*, 37 VA. L. REV. 969, 970 (1951). This was an even bigger advantage for the plaintiff and a bigger injustice to the defendant. Head, *supra* note 1, at 24. This was also the reason for the first statutory restriction on the absolute right of voluntary dismissal. Head, *supra* note 1, at 24-25; *see infra* note 18 and accompanying text.

[8] Head, *supra* note 1, at 22.

[9] *Id.* The plaintiff could not be dismissed unless he or she agreed to the dismissal. *Id.*

[10] *See id.* at 21-22. It appears this was common practice by 1371 because it occurred without any comment. *Id.*

liberal pleading rules that presently exist.[11] Furthermore, causes of action had to be pursued under ancient writs. Thus, if the plaintiff sued under an incorrect writ, he or she was unable to remedy the mistake. The plaintiff would then lose his or her case under the incorrect writ. Times have changed, however, and "[t]he plaintiff's common law right to voluntary dismissal is no longer necessitated by hypertechnical rules of procedure which once prevailed in England."[12]

The plaintiff was also limited by the common law concept of "amercement." "Amercement" literally meant that the losing party was at the "mercy of the court."[13] By voluntarily dismissing, the plaintiff basically conceded defeat and was subject to whatever the court decided. The court could even impose a fee—a penalty the plaintiff would not take lightly.[14] Courts, however, abandoned the doctrine of amercement during the seventeenth and eighteenth centuries leaving the plaintiff with the unchecked absolute right to dismiss.[15] "The common-law [voluntary dismissal] is the result of a legal rule retained in our law after its purpose has been lost sight of and any possible reason for its existence has disappeared."[16]

The United States adopted the same common law concept of an absolute right of voluntary dismissal until the verdict, but without the amercement concept.[17] Abuse by plaintiffs and the "injustices done to the defendant," however, gave rise to statutory modification of voluntary dismissal.[18] The common law rule was well established, which made it unlikely that a court would ever limit voluntary dismissal. Therefore, legislation was necessary in order to make reforms to the absolute right of voluntary dismissal.[19]

Statutory modification of voluntary dismissal is not a new concept. In England, as early as 1400, statutes prohibited the plaintiff from dismissing after the verdict

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[11] *See* FED. R. CIV. P. 8.

[12] Lawrence Mentz, Note, *Voluntary Dismissal by Order of Court—Federal Rules of Civil Procedure Rule 41(a)(2) and Judicial Discretion*, 48 NOTRE DAME L. REV. 446, 459 (1972-1973). This argument, however, fails to entertain the possibility that the absolute right to voluntary dismissal may address another issue in modern law.

[13] Head, *supra* note 1, at 24 n.26.

[14] *Id.*

[15] Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1264 (1987). Head also mentions the downfall of amercement. Head, *supra* note 1, at 24.

[16] Head, *supra* note 1, at 24.

[17] *Id.* at 25.

[18] James L. Tucker, *The Voluntary Nonsuit in Virginia*, 7 WM. & MARY L. REV. 357, 359 (1966). The specific abuse that led to the change were plaintiffs voluntarily dismissing after the verdict in order to have a new trial to get a more advantageous damages verdict. *See supra* note 7 and accompanying text. Voluntarily dismissing after the verdict, however, was not the only abuse of voluntary dismissal. Specifically, the common law did not restrict the number of voluntary dismissals that the plaintiff could have. Head, *supra* note 1, at 22 (citation omitted); *see infra* note 58.

[19] Head, *supra* note 1, at 25-26.

had been given.[20] Likewise, statutory modification became the technique that individual states in the United States utilized to continue limiting voluntary dismissal.[21] Many problems existed, however, with these early state standards.[22] Some standards did not provide a precise moment for when the plaintiff lost his or her absolute right to voluntary dismissal.[23] Furthermore, the newer standards set by the states were still subject to abuse. Since the adoption of the common law, the trend in the United States has been to shorten the time that a plaintiff has to voluntarily dismiss without judicial interference.[24]

B. Voluntary Dismissal in Federal Courts

Prior to the adoption of the Federal Rules, voluntary dismissal in federal court was controlled by the Conformity Act.[25] The Act required the federal courts to follow the rules of civil procedure of the state where the trial court sat, including the rules on voluntary dismissal.[26] Many states codified their own rules, and the federal courts had to deal with a variety of rules on voluntary dismissals. On one hand, many states significantly restricted voluntary dismissal; however, many others kept it as broad as the common law.[27] To remedy the disparity among the states, the federal government eventually decided to create uniform rules for federal courts, including a rule addressing voluntary dismissal.

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[20] Lipkin, *supra* note 7, at 970.

[21] *Id.* at 970-71; *see also* Head, *supra* note 1, at 25-26 (noting that the common law became too strong to limit when a plaintiff could voluntarily dismiss, which in turn required the states to turn to the legislatures).

[22] *See, e.g.*, Raymond v. Costallas, 70 A.2d 636 (Pa. 1950) (upholding a voluntary dismissal made after the jury returned but before the clerk asked the jury if they had come to a verdict). This begs the question, did someone give away what the verdict was going to be?

[23] *See id.*

[24] Joseph Flum, Note, *Voluntary Nonsuit From Birth to Present*, 23 TEMP. L.Q. 136, 137 (1949-1950).

[25] 28 U.S.C. § 724 (1934), *repealed by* Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

[26] *Id.* ("The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.").

[27] The trend of restricting the right of a plaintiff to voluntary dismissal has whittled down the number of states that retain a common law rule on voluntary dismissal. *Compare* Lipkin, *supra* note 7, at 986 (concluding that three-fourths of the states retaining voluntary dismissal rules allow dismissal well through the commencement of the trial), *with* Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J.L. REFORM 367, 376-77 (2003) (concluding that all but thirteen states follow a close approximation of the Federal Rule).

The United States Congress passed the Rules Enabling Act in 1934,[28] which permits the Supreme Court to create "general rules of practice and procedure and rules of evidence for cases in the United States district courts."[29] Four years later, the Supreme Court—with the help of the Advisory Committee—created the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure were created not only as a codification of rules of procedure but also as an instrument of reform. For example, the Federal Rules created much more liberal pleading requirements.[30] The Federal Rules also revolutionized the rule on voluntary dismissal.

The Federal Rules limit a plaintiff's right to voluntary dismissal of a cause of action to a further extent than any of the states. The Federal Rule allows the plaintiff to dismiss by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."[31] An answer and a motion for summary judgment are actions that are normally taken directly after the plaintiff has filed his or her complaint. Why such a drastic change? The Advisory Committee's notes mention an Illinois statute that allowed voluntary dismissal only up to the start of the trial.[32] The Advisory Committee also references the English Rules that, at the time, allowed voluntary dismissal only before a party received an answer or before any proceeding.[33] The adopted Federal Rule appears to closely follow the English rule.[34] Regardless of what influenced the Advisory Committee's decision, it is obvious that the Committee intended to limit the plaintiff's right to voluntary dismissal in order to curb abuses.[35]

The states, likewise, started to restrict voluntary dismissal even more. While in 1951, only five states had adopted the Federal Rule concerning voluntary dismissals,[36] today only thirteen states have not adopted the Federal Rule—Ohio is

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[28] Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

[29] *Id.*

[30] *See* FED. R. CIV. P. 8.

[31] FED. R. CIV. P. 41(a)(1)(A)(i).

[32] FED. R. CIV. P. 41 advisory committee's note (citing ILL. REV. STAT. (1937) c. 110, § 176) ("The plaintiff may, at any time before trial or hearing begins, upon notice to the defendant or his attorney, and on the payment of costs, dismiss his action or any part thereof as to such defendant, without prejudice, by order filed in the cause. Thereafter he may dismiss on the same terms, only [by stipulation or order of the court]."). Like Ohio's current rule, Illinois limited voluntary dismissal after the trial commences. *Id.*; OHIO R. CIV. P. 41. Although the Illinois Rule was one of the most restrictive in 1937, Illinois is one of the thirteen states that have yet to retain the federal standard or a similar standard. *See supra* note 27 and accompanying text.

[33] FED. R. CIV. P. 41 advisory committee's note (citing *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26).

[34] Head, *supra* note 1, at 27; *see infra* note 39 and accompanying text.

[35] Solimine & Lippert, *supra* note 27, at 374.

[36] Lipkin, *supra* note 7, at 985.

one of the thirteen.[37] All the other states—and the District of Columbia[38]—have adopted the Federal Rule provision on voluntary dismissal exactly or with only minor alterations.[39] Many commentators consider this trend "desirable."[40]

III. COMPARING THE ANTIQUATED OHIO RULE TO THE MODERN FEDERAL RULE

A. Early Voluntary Dismissal in Ohio

Ohio inherited the common law rule on voluntary dismissal.[41] Like other states, Ohio also decided to limit the absolute right to dismiss.[42] Setting boundaries to voluntarily dismissal is problematic. Deciding when plaintiffs are permitted to voluntarily dismiss during civil litigation creates problems concerning prior adverse decisions. For example, if the court denies admission of the plaintiff's evidence, he or she could just dismiss and avoid the negative impact of that decision. Furthermore, determining what role the court should play in voluntary dismissal also presents hurdles. If the court is given a limited role, the risk of abuse is elevated. If the court is given too much discretion, however, the risk that the plaintiff may be unfairly prejudiced is elevated.

The principal issue is where to draw the line with respect to the plaintiff's unfettered right to voluntarily dismiss a cause of action. Furthermore, this limit may be set at many different places during the course of litigation.[43] For example, the time may be limited to after the complaint is filed, when the motion for summary judgment is filed, when preliminary hearings occur, or when the trial starts.

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[37] Solimine & Lippert, *supra* note 27, at 376-77. Although the author's count yields eighteen states, it varies depending upon what one considers a modification of the Federal rule. *See infra* notes 153-154 and accompanying text.

[38] The District of Columbia's adoption of the Federal Rule concerning voluntary dismissal does not carry much weight. The District of Columbia is governed by the federal government, and it would be unlikely that it would adopt a different standard than the federal courts. The United States Constitution provides that the United States has the right "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. CONST. art. I, § 8, cl. 17.

[39] Solimine & Lippert, *supra* note 27, at 376-77. Many commentators have embraced the Federal Rule concerning voluntary dismissal and urge the states to follow in suit. *See, e.g.*, FED. R. CIV. P. 41 advisory committee's note (citing *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26); Head, *supra* note 1, at 27 (arguing for the "English rule" that is very similar to the federal rule); Solimine & Lippert, *supra* note 27, at 404-05; Steven C. Ward, Gibellina v. Handley*: Toward a Federal Approach to Voluntary Dismissal*, 79 ILL. B.J. 336, 358 (1991).

[40] Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Voluntary Nonsuit*, 63 YALE L.J. 738, 742 (1954) [hereinafter *Absolute Dismissal*].

[41] Heirs of David French v. French, 8 Ohio 214 (1837). Other cases made the point that the right to dismiss was normal practice. *See* Harbeson v. Gano, 10 Ohio Dec. Reprint 396 (1853). The entire opinion in *Harbeson* is one sentence.

[42] OHIO REV. STAT. § 5314 (Swan 1854).

[43] Lipkin, *supra* note 7, at 970 ("There are, obviously, innumerable places in the proceedings of a trial which the legislature could conveniently choose.").

In 1853, the Ohio General Assembly, in its first session under the new constitution of 1851, tackled the task of creating a civil code.[44] The wording it chose in the 1853 statute remained the rule of voluntary dismissal until the adoption of the Ohio Rules of Civil Procedure in 1970.[45] Under the 1853 statute, an action could be dismissed without prejudice "[b]y the plaintiff, before its final submission to the jury, or to the court, when the trial is by the court."[46] This statute gave the plaintiff an absolute right to voluntarily dismiss any time before the issue was submitted to the trier-of-fact for determination.

B. The Recent Ohio Rules

Ohio is not lagging behind in the adoption of the other Federal Rules' provisions. In 1970, Ohio used the Federal Rules as a model for the newly created Ohio Rules and altered the Federal Rules when necessary.[47] Ohio not only refused to adopt the Federal Rule concerning voluntary dismissal, it also chose not to integrate Ohio's previous rule on voluntary dismissal into the new Ohio Rules.[48] Instead, when the Ohio Rules were drafted in 1970, the General Assembly repealed the previous statute[49] and adopted another standard completely.

The Ohio Rule states that a plaintiff may dismiss by "filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant."[50] The statute is unambiguous and has no need for construction by the courts.[51] A question remains as to why Ohio changed its approach to voluntary dismissal.

C. The Rationale of the Current Ohio Rule

The staff notes to the Ohio Rules do not provide any rationale for why the Supreme Court of Ohio changed the law.[52] An Ohio judge intimate with the making of the rule indicated an Ohio tradition "of encouraging voluntary terminations."[53]

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[44] OHIO REV. STAT. § 5314 (Swan 1854).

[45] *See* OHIO REV. CODE ANN. § 2323.05(A) (Baldwin 1964), *repealed by* H.R. 1201, 108th Gen. Assem. (Ohio 1970).

[46] *Id.*

[47] JOHN V. CORRIGAN, OHIO JUDICIAL CONFERENCE, THIRD BIENNIAL REPORT TO THE GENERAL ASSEMBLY OF OHIO AND THE GOVERNOR OF OHIO: REPORT OF THE RULES ADVISORY COMMITTEE 26-27 (1969).

[48] OHIO REV. CODE ANN. § 2323.05(A).

[49] H.R. 1201, 108th Gen. Assem. (Ohio 1970) (repealing OHIO REV. CODE ANN. § 2323.05(A) (Baldwin 1964)).

[50] OHIO R. CIV. P. 41(A)(1)(a).

[51] Standard Oil Co. v. Grice, 345 N.E.2d 458, 461 (Ohio Ct. App. 1975).

[52] *Id.* at 460.

[53] *Id.* Solimine also elaborated that the rule was adopted in light of Ohio's "tradition of encouraging voluntary dismissal." Solimine & Lippert, *supra* note 27, at 377. The author elaborates by citing specific cases such as a case that allowed voluntary dismissal after an adverse decision but before it was journalized by the clerk. *Id.* at 377-78.

Judge McBride—who was on the advisory committee that wrote the rules—reviewed the records from the rules committee to clarify the reasons why the rule was changed.[54] The first draft of the Ohio Rule concerning voluntary dismissal mirrored the Federal Rule.[55] Some on the committee, however, objected.[56] Specifically, some committee members thought that the plaintiff should have the absolute right to voluntarily dismiss at least once.[57] The Federal Rule provides this right, but it is limited to early stages of the trial.[58] The opponents of the Federal Rule on voluntary dismissal were concerned about injustices to the plaintiff in certain circumstances, such as if a judge refuses to grant a continuance on the day of the trial.[59] After considering a number of possibilities, the committee settled on allowing plaintiffs to voluntarily dismiss up to the "commencement" of the trial.[60]

Ohio's action demonstrates that issues did exist with the absolute right of voluntary dismissal. By transforming the law, Ohio tacitly conceded that the reasons behind the absolute right to dismiss have at least diminished and that voluntary dismissal may be abused. With the limited information available, the committee apparently did not even consider retaining the old Ohio rule.[61] By agreeing to such a change, the committee—a group of Ohio lawyers, judges, and law professors—indicated that the reasoning behind limiting voluntary dismissal is persuasive.

The rule for voluntary dismissal does not operate in a vacuum. Here, the committee looked at the possible effects that a change in the rule would have on other rules and actions.[62] The committee pointed out the differences between the

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[54] *Standard Oil Co.*, 345 N.E.2d at 460-61. Judge Robert L. McBride—the one who wrote this opinion—also served on the committee that wrote the rules. CORRIGAN, *supra* note 47, at 27. The cases raised the issue of involving a voluntary dismissal of a counterclaim. The voluntary dismissal was after the court's opinion that would have disposed of the counterclaim on its merits but before it was journalized. *Standard Oil Co.*, 345 N.E.2d at 460. The trial court then struck down the voluntary dismissal and placed the adverse opinion in its place. *Id.*

[55] *Standard Oil Co.*, 345 N.E.2d at 460.

[56] *Id.* McBride identifies that it was the attorneys on the committee who objected to the Federal Rule. *Id.* The committee also had judges and law professors as members. CORRIGAN, *supra* note 47, at 26.

[57] *Standard Oil Co.*, 345 N.E.2d at 460.

[58] The Federal Rule, however, limits the number of voluntary dismissals to only one: "[I]f the plaintiff previously dismissed any federal—or state—court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." FED. R. CIV. P. 41(a)(1)(B); *see also supra* note 18.

[59] *Standard Oil Co.*, 345 N.E.2d at 460-61.

[60] *Id.* at 461. The committee considered limiting voluntary dismissal to after empanelling the jury or to the time the case is called. *Id.* Later, the committee decided that it should be at the commencement of the trial. *Id.*

[61] *See id.* at 460-61.

[62] At one time, a version of the rule limited voluntary dismissals to before the trial was "called." Apparently this was subject to various meanings in different jurisdictions. *Id.* at 460. Although, the drafters made it clear that they intended the point when dismissal became restricted to be before the voir dire. *Id.*

state and federal court systems.[63] The record available is incomplete as to what other aspects were discussed.[64] The committee did not know for sure what effects the new civil procedure system would have in Ohio; they were adopting a radically different civil procedure system than the one that was currently in place. The committee did not want to go too far and prejudice the plaintiffs. Now that it is apparent how liberal the Ohio Rules are with respect to pleadings and continuances, the old rule is obsolete.

D. Stalled Reforms in Ohio

The Ohio Rule on voluntary dismissal has not gone unchallenged; politically powerful groups, however, have continually stopped any change from going forward. The Ohio Academy of Trial Lawyers successfully opposed a movement to limit voluntary dismissals to five days before the scheduled trial date.[65] This draws two important points. First, it demonstrates that a change in the rule is desired. This is obviously not a fleeting desire but a powerful movement that a large group of people were willing to set in motion. The committee actually recommended that the Supreme Court of Ohio change the rule, but the Court did not adopt the suggested changes.[66] The committee's willingness to adopt the changes demonstrates that there is sound reasoning for a change in the Ohio rule.

Furthermore, another conclusion that can be drawn from the opposition to changing the current law on voluntary dismissal is that a strong group benefits from the current law. This demonstrates that plaintiffs do use voluntary dismissals or at least rely on them to a certain degree.[67] Logically, if voluntary dismissals were never used, no one would work so hard to defend the current rule. Such a response to a limited expansion shows the enormous support for the current rule. This, however, does not necessarily mean that the groups advocating for retention of the current rule are condoning abuse of the rule. Proponents of the current rule may be trying to defend a tactical advantage. Furthermore, such groups are most likely concerned with potential prejudice to plaintiffs.

E. The Language of the Ohio and Federal Rules

The Ohio Rules state that a plaintiff may dismiss by "filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant."[68] A plaintiff only has to file "notice."[69] This means that the court does not determine whether to approve the dismissal. This leaves the discretion solely in the hands of the plaintiff. Unfortunately, the definition for "commencement of the

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[63] *Id.*

[64] OHIO R. CIV. P. 41 staff note (1970). Another commentator examined the evidence as to why Ohio did not adopt the Federal Rule. Solimine & Lippert, *supra* note 27, at 377-78.

[65] Solimine & Lippert, *supra* note 27, at 384 n.79.

[66] *Id.*

[67] *Id.* at 383-84.

[68] OHIO R. CIV. P. 41(A)(1)(a).

[69] *Id.*

trial" is not in the rule.[70] An Ohio court of appeals found that the trial started "when the jury is empaneled [sic] and sworn, or, in a bench trial, at opening statements."[71] In Ohio, once the trial starts, the plaintiff may no longer voluntarily dismiss by filing notice.[72] In order for the plaintiff to dismiss following that period, he or she must rely on Ohio Rule 41(A)(2).[73]

Ohio Rule 41(A)(2) provides that, except for under (A)(1), "a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper."[74] The rule mandates that if the plaintiff cannot dismiss under Rule 41(A)(1)(a), an order from the court is needed to dismiss.[75] Furthermore, the court may add terms and conditions as it "deems proper."[76] This allows the court to put conditions on dismissal and permits the court to refuse dismissal if those conditions are not met. Furthermore, due to the similarity between the Federal Rule and the Ohio Rule, a few Ohio courts of appeals have adopted the federal standard of allowing dismissal "unless the defendant will be prejudiced."[77]

The Ohio Rule, no doubt, is a plaintiff-friendly rule.[78] It allows the plaintiff to voluntarily dismiss up to the start of trial. In many cases, however, much—if not most—of the effort is done before the trial even starts. For example, depositions, evidence, and a myriad of other work must be completed to be fully prepared for trial. All this effort put to the front end of the litigation indicates that both parties may have invested a considerable amount of time and money before the trial starts. Additionally, Ohio's saving statute makes Ohio law especially plaintiff-friendly.[79]

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[70] 4 MICHAEL E. SOLIMINE, ANDERSON'S OHIO CIVIL PRACTICE §168.02 (2d ed. 2009) (citing Patrick Carroll, Note, *The Meaning of the Term "Trial" Within the Ohio Rules of Civil Procedure*, 25 CLEV. ST. L. REV. 515 (1976)). The article that Solimine cites argues that a trial commences "when the oath or affirmation is administered to the array of prospective jurors." Carroll, *supra*, at 532. Later an Ohio Court of Appeals came to the same conclusion. Frazee v. Ellis Bros., 682 N.E.2d 676, 678 (Ohio Ct. App. 1996).

[71] *Frazee*, 682 N.E.2d at 678.

[72] OHIO R. CIV. P. 41(A)(1)(a).

[73] OHIO R. CIV. P. 41(A)(2) ("Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper.").

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Capital One Bank v. Woten, 861 N.E.2d 859, 862 (Ohio Ct. App. 2006) (following the Ninth District's description of the federal standard).

[78] Solimine & Lippert, *supra* note 27, at 383.

[79] OHIO REV. CODE ANN. § 2305.19 (West 2009). "[A] voluntary dismissal pursuant to Civ.R. 41(A)(1) constitutes failure 'otherwise than upon the merits' within the meaning of the savings statute." Frysinger v. Leech, 512 N.E.2d 337, 342 (Ohio 1987). Commentators have discussed the effects of the Ohio saving statute. *See* Solimine & Lippert, *supra* note 27, at 378 n.44; Constance Whyte Reinhard, Note, *Pitfalls Associated with the Ohio Saving Statute*, 36

The savings statute gives the plaintiff one year to re-file.[80] In many cases, this may act to extend the statute of limitations.[81] As such, these rules grant a considerable advantage to plaintiffs.

The language of the Federal Rule allows voluntary dismissal, subject to other rules and federal statutes, by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."[82] The notice requirement is identical to the Ohio Rule, and the only substantive difference is the moment in litigation that the plaintiff loses his right to dismiss by notice. Once the defendant files an answer or a motion for summary judgment,[83] the plaintiff is constrained and may only dismiss if the judge permits it. Under the Federal Rule, a plaintiff is afforded an opportunity to go to the judge and request a voluntary dismissal without prejudice.[84] The Ohio rule on voluntary dismissal by order of the court follows the Federal Rule nearly exactly.[85] Federal judges acquire discretion on voluntary dismissal once an answer or motion for summary judgment is filed.[86] In Ohio, judges acquire discretion on voluntary dismissal after the commencement of the trial—much later than the federal judges.[87]

F. Significant Differences Between the Federal Rules and the Ohio Rules

The Federal Rules were established, passed, and promulgated in a very different context than were the Ohio Rules. The new Federal Rules were a radical change to

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OHIO ST. L.J. 876 (1975) (discussing the problems with the Ohio saving statute). The problems with the saving statute are still being litigated today.

[80] OHIO REV. CODE ANN. § 2305.19(A) ("In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, *whichever occurs later*. This division applies to any claim asserted in any pleading by a defendant." (emphasis added)). This allows the plaintiff to extend the time that he or she has to re-file by possibly longer than the statute of limitations.

[81] *See, e.g.*, Naragon v. Dayton Power & Light Co., 934 F. Supp. 899, 902 (S.D. Ohio 1996). *Naragon* provides some insight; however, it is a federal case and, therefore, is not controlling.

[82] FED. R. CIV. P. 41(a)(1)(A)(i).

[83] The motion for summary judgment was added to the rule in 1946. FED. R. CIV. P. 41 advisory committee's note (1946). The reasoning given was that drafting a motion for summary judgment may require more time and research than filing an answer. *Id.* Furthermore, a motion for summary judgment may be filed before the answer and may eliminate the need for an answer. *Id.*

[84] FED. R. CIV. P. 41(a)(2).

[85] *Compare id.* ("Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."), *with* OHIO R. CIV. P. 41(A)(1).

[86] *See* FED. R. CIV. P. 41(a)(1)(A)(i), (a)(2).

[87] *See id.*; OHIO R. CIV. P. 41(A)(1)(a), (A)(2).

civil procedure. The rules reformed civil procedure by providing very liberal rules for pretrial discovery, pleadings, and continuances.[88] Additionally, the new rules offered the plaintiff alternatives to voluntary dismissal.[89] As such, the Supreme Court also decided to limit a plaintiff's opportunity to voluntarily dismiss to prior to the time the defendant filed an answer.[90]

Because Ohio adopted rules similar to the federal system, the liberal standards would likely be applied in Ohio as well. This seems to question Ohio's logic behind refusing to limit the right of voluntary dismissal to the same extent as the Federal Rules. This argument assumes that federal courts and Ohio courts are identical—highly unlikely. Ohio—like most states—has made some tort reform that increases the burdens on plaintiffs. One such measure is included in the Ohio Rules themselves. Specifically, Ohio Rule 10(D)(2) requires an additional affidavit in a medical liability claim.[91] Beyond this limited case, however, plaintiffs in Ohio have a similar burden than those in other state courts and in the Federal courts. This rule demonstrates that a new Ohio rule concerning voluntary dismissal must consider the Ohio judicial system in order to achieve the best fit.

IV. PROBLEMS

Regardless of the burden placed on the plaintiff, the current Ohio Rule still provides an opportunity for abuse. It is difficult, however, to determine the extent that a plaintiff could manipulate the system under the current scheme. This is due, in part, to the fact that Ohio does not differentiate the amount of cases that are voluntarily dismissed each year in its Court Reports. Likewise, other states and the federal courts do not seem to keep records either.[92] Some commentators, however,

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[88] "It should be observed that the potential hardship of the restrictive federal rule is alleviated by the liberal amendment and continuance provisions which adequately protect the plaintiff from surprise at trial." William W. Sweeney, *Nonsuit in Virginia*, 52 VA. L. REV. 751, 754 (1966).

[89] In circumstances where the plaintiff is entirely caught off guard, the plaintiff could always request a continuance. "[I]t would seem to be an abuse of discretion for a trial judge not to grant a continuance in such a situation." Solimine & Lippert, *supra* note 27, at 387-88. The Federal Rules provide other avenues for plaintiffs besides voluntary dismissal. The Federal Rules provide that each court controls scheduling. FED. R. CIV. P. 40. Also, the Federal Rules allow extensions of time to file motion papers with good cause. FED. R. CIV. P. 6(b). Furthermore, the same standard (good cause) applies to rescheduling for pre-trial conferences as well. FED. R. CIV. P. 16(b)(4).

[90] *See* Naragon v. Dayton Power & Light Co., 934 F. Supp. 899, 903 (S.D. Ohio 1996); Flum, *supra* note 24, at 140; Sweeney, *supra* note 88, at 754; *Absolute Dismissal*, *supra* note 40, at 742.

[91] OHIO R. CIV. P. 10(D)(2). The rule was amended in 2005 to impose this new restriction on medical liability actions. Ohio is not alone with these types of restrictions. In Wisconsin's Rule on voluntary dismissal, a special restriction permits the court to dismiss false claims for medical assistance. WIS. STAT. ANN. § 805.04(2m) (West 2009); WIS. STAT. ANN. § 20.931(1)(b) (West 2009) (defining what constitutes a false claim for medical assistance).

[92] *See* Solimine & Lippert, *supra* note 27, at 382 ("Unfortunately, there appears to be little hard data that can be brought to bear on the use of Rule 41(a). Official statistics kept for the federal court keep track of dismissals in a generic fashion, and thus do not differentiate between or among dismissals founded on Rules 12 or 41."); Sweeney, *supra* note 88, at 764

postulate that litigants often abuse the system by exercising the unfettered right to dismiss their cause of action.[93] On the other hand, information is not available on how many of those cases were dismissed due to legitimate issues or concerns. As mentioned above, many commentators[94] and an Ohio judge have protested the inequities of the Ohio Rule on voluntary dismissal.[95]

A. Injury to the Court

The plaintiff is given a considerable amount of power, and if he or she abuses it, he or she can "subject the state and defendant to expense and loss of time."[96] Ohio certainly has "a valuable right" in litigation and, by extension, an interest affected by voluntary dismissal.[97] Voluntary dismissal results in courts becoming congested with "unnecessary litigation."[98] Abusing voluntary dismissal depletes the resources of the court.[99] Furthermore, Ohio's Rule on voluntary dismissal is contrary to the doctrine of *res judicata*. "The public policy inherent in the doctrine of res judicata demands that needless litigation be avoided and that there be an end to legal controversy."[100] On the larger stage, "[t]he ends of justice are defeated when the plaintiff is permitted to harass the defendant and to waste the time of the court and

("Statistics on nonsuits are not easily obtained because few courts in this state keep a separate record of them as such.").

[93] *See* Sweeney, *supra* note 88, at 751 ("Virginia lawyers, especially those representing plaintiffs, have long utilized the voluntary nonsuit as a valuable trial tactic, often to escape a losing battle." (citation omitted)). Solimine and Lippert state:

> [T]here is nonetheless some evidence that such dismissals are sought or obtained with some frequency in both federal and state courts. With regard to unilateral voluntary dismissals, attorneys report that such dismissals are not uncommon, especially in a state like Ohio with a plaintiff-friendly rule. A recent study of civil rights actions filed in federal court indicated that up to twelve percent of such cases were voluntarily dismissed (as opposed to other types of terminations and dismissals).

Solimine & Lippert, *supra* note 27, at 383 (citation omitted). Others disagree, such as Tucker, *supra* note 18, at 357 ("[T]he voluntary nonsuit . . . is often completely ignored by the plaintiff's lawyer."), but the author differentiates this by saying that this is because of the confusion in that state's dismissal practices. The arguments made against earlier movements for reform in the Ohio law also provide insight as to how much it is used and whether it is really used for a tactical advantage. *See infra* note 120.

[94] In 1918, a commentator in the United States was complaining about the abuses caused by the absolute right of voluntary dismissal. Carroll G. Walter, *Right of Plaintiff to Discontinue or Submit to Nonsuit*, 13 BENCH & B., NEW SERIES 464, 466 (1918-1919).

[95] Hosner v. Gibson Partner, Inc., 32 Ohio Misc. 2d 4 (Ohio Ct. Com. Pl. 1986) (finding the abuse of the Ohio Rule concerning voluntary dismissal permitted the court to award the defendant attorney fees in addition to costs despite the language of the rule). Later, the Supreme Court of Ohio found that Ohio Rule 41(D) did not permit an award of attorney fees. Muze v. Mayfield, 573 N.E.2d 1078, 1079 (Ohio 1991); *see also infra* Part V.A.

[96] Head, *supra* note 1, at 24.

[97] Lipkin, *supra* note 7, at 987.

[98] Sweeney, *supra* note 88, at 767.

[99] *See* Sweeney, *supra* note 88, at 767; Lipkin, *supra* note 7, at 987.

[100] Lipkin, *supra* note 7, at 987; *see also* Sweeney, *supra* note 88, at 767.

the money of the public."[101] Judges and scholars have recognized that voluntary dismissal is diametrically opposed to "the public interest in efficient administration of justice."[102] Finally, voluntary dismissals late in the process may leave jurors—who sacrifice time to perform their civic duty—sitting idle.[103] The only positive feature of voluntary dismissal is that it may clear crowded dockets; but this only occurs if the complaints are dismissed with enough time for judges to reschedule.[104]

The current Ohio Rule permits, and in some situations encourages, eleventh-hour voluntary dismissals. The saving statute gives the plaintiff one year from the date of the dismissal to re-file.[105] If the plaintiff is not prepared, he or she may just wait until the last minute in order to get a longer time to re-file or try to see if the opposing party will settle. The plaintiff does not benefit in any way by voluntarily dismissing earlier. Once again, court resources would be left idle while the docket continues accumulating.

B. Strategic Abuse

Voluntary dismissal may be used strategically. In a few instances, the strategic use of voluntary dismissal is not abusive to other parties or the courts. "[I]f an attorney is faced with a case that appears non-meritorious or not cost-effective, or if he simply cannot get along with his client, he can dismiss the case without prejudice."[106] Furthermore, if the case is discovered shortly before the statute of limitations, an attorney may file a complaint and receive additional time to assess whether the case should be continued.[107] Voluntary dismissal that is used for other strategic goals, however, damages other parties and judicial efficiency.

Voluntary dismissal bestows on the plaintiff an immense tactical advantage.[108] For example, a plaintiff may dismiss part of the action in one jurisdiction—say, Ohio—and then re-file that claim in California forcing the defendant to appear in both places adding expense and giving the plaintiff leverage to force a settlement.[109]

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[101] Lipkin, *supra* note 7, at 987.

[102] Jeffrey C. Regan, Note, *Plaintiffs' Absolute Right to Voluntary Dismissal: Legitimate Right or Abuse of Judicial Process?*, 36 U. FLA. L. REV. 118, 143 (1984).

[103] Sweeney, *supra* note 88, at 768.

[104] Daniel D. Mason, Note, Hosner v. The Gibson Partner *Warning: "Free" Dismissals Under 41(A)(1)(A) Can Really Cost*, 19 CAP. U. L. REV. 233, 233 (1990). The author backs this up by saying that most cases that are voluntarily dismissed are never re-filed, but he fails to cite any evidence for this. *Id.* at 234.

[105] OHIO REV. CODE ANN. § 2305.19(A) (West 2009).

[106] Mason, *supra* note 104, at 234.

[107] *Id.; see also* OHIO REV. CODE ANN. § 2305.19(A).

[108] Sweeney, *supra* note 88, at 767.

[109] Thomas Southard, *Increasing the "Costs" Nonsuit: A Proposed Clarifying Amendment to Federal Rule of Civil Procedure 41(D)*, 32 SETON HALL L. REV. 367, 367 (2002). In some cases, much of the pretrial materials prepared by the defendant might be used in the later litigation, but in other cases, the defendant may have to start again whenever the plaintiff re-files. This might not be a problem in all cases, but it would be unfair in cases where the pre-trial discovery would have to happen all over again. Normally, the considerable amount of

If a judge's discretion was put between the plaintiff and this dismissal, the judge could demand terms and conditions that could lessen the effect of this rule.[110] In fact, this tactic is frequently used to make litigation difficult and force a settlement.[111] Furthermore, plaintiffs may bluff until the last minute, not prepare at all, induce defendants to incur expenses, and then dismiss the cause of action.[112] This abuse "may not affect the substantive rights of the defendant," but it still costs time and money and increases the possibility of prolonged litigation.[113]

Furthermore, the Ohio Rule permits the plaintiff to get a preview of the defendant's case, including possible defenses during the discovery phase.[114] At the same time, the plaintiff may, in advance, plan on voluntarily dismissing his or her cause of action and reserve crucial evidence normally revealed during the discovery phase.[115] Conversely, in these situations the defendant has no choice but to present the best evidence for his or her case.[116] Thereafter, the plaintiff can dismiss his or her case, prepare for the defendant's evidence and defenses, and re-file his or her claims.

C. No Judicial Oversight

The abuses of voluntary dismissal could be easily cured by judicial oversight. Ohio, however, does not provide judicial oversight until the trial starts. If Ohio did have judicial oversight, then a judge would see a tactical abuse of the rule and be able to stop it before the plaintiff gains an advantage. The Federal Rules address the possibility of abuse by conferring discretion to judges to determine whether to allow voluntary dismissals after an answer or a motion for summary judgment is filed.[117] This rule affords plaintiffs the opportunity to argue their cases for dismissal before the judge. This rule is not without flaws. For example, issues may arise concerning the amount of discretion given to the court as well as the malleable standard for when a voluntary dismissal is appropriate.

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time and money the defendant expends before the trial will go to waste if the plaintiff re-files. *See* Solimine & Lippert, *supra* note 27, at 388-99.

[110] *See* OHIO R. CIV. P. 41(A)(2).

[111] Southard, *supra* 109, at 367.

[112] Sweeney, *supra* note 88, at 768.

[113] Tucker, *supra* note 18, at 366-67.

[114] *Id.* at 367.

[115] Sweeney, *supra* note 88, at 767 ("Defense attorneys argue that nonsuit allows the plaintiff to use the first trial as a substitute for pretrial discovery to preview the defendant's case. Thus although the plaintiff may 'keep under wraps' his best witnesses when he presents his case because he knows that he is going to nonsuit, the defendant cannot be sure whether or not the plaintiff will in fact nonsuit and therefore must put his best foot forward by using all his witnesses at trial.").

[116] Tucker, *supra* note 18, at 366-67.

[117] FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.").

V. POSSIBLE SOLUTIONS: PUTTING THE GENIE BACK IN THE BOTTLE

Ohio's voluntary dismissal rule facilitates abuse and needs to be changed. The reasons for the absolute right of voluntary dismissal at common law have evaporated. Ohio's rationales for retaining this antiquated doctrine are unfounded. The idea that the plaintiff has a right to have complete control over his or her case is obsolete.[118] Ohio should not build rules of civil procedure on such a weak foundation.

Change, however, is a hard task to undertake. Ohio adopted the current rule only after careful consideration and debate.[119] In addition, previous failed attempts to amend the rule demonstrate a sharp resistance by powerful groups in Ohio.[120] Ohio must consider these factors in deciding what new standard should be adopted for voluntary dismissal.

Furthermore, a few important principles should be considered when evaluating a procedural rule. First, the rules must consider the interests of the parties involved. The rule cannot focus solely on the possible abuses by plaintiffs against defendants and create a new rule that allows prejudice against plaintiffs. The rule must balance the interests of all parties involved.[121] Without balancing these interests, the limitation would become "no more than meaningless technicalities."[122] Finally, the solution "should be fitted to modern needs and circumstances."[123] The recent trend of increasing expenses of pretrial discovery is an issue that should be considered.[124]

A. Solution 1: Adopt Procedural Limitations

It may not be necessary for Ohio to alter the current rule on voluntary dismissal to address the issue of abuse. Currently, Ohio Rule 41(D) allows the court to award the defendant reasonable costs if the plaintiff re-files in an Ohio court after a voluntary dismissal.[125] This discourages attorneys from filing voluntary dismissals

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[118] Sweeney, *supra* note 88, at 766.

[119] Standard Oil Co. v. Grice, 345 N.E.2d 458, 460-61 (Ohio Ct. App. 1975) (noting the process the advisory committee utilized in creating the rule on voluntary dismissal).

[120] 4 SOLIMINE, *supra* note 70, at § 168.01 (noting two times that attempts to change Rule 41(A) have failed); *see also* Solimine & Lippert, *supra* note 27, at 383 nn.75-79. Michael E. Solimine, the writer of the preceding reference, apparently has a close connection to the reforms suggested in Ohio. *Id.* at 383 n.79.

[121] Sweeney, *supra* note 88, at 767.

[122] *Id.* at 766.

[123] Tucker, *supra* note 18, at 367.

[124] "[A]ny change in the [Federal Rule concerning voluntary dismissal] should be directed towards protecting the defendant from wasted expenditure. The preparation and filing of any motion involves considerable expense." *Absolute Dismissal*, *supra* note 40.

[125] OHIO R. CIV. P. 41(D) ("If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order."). However, there is considerable discussion about what is covered in the definition of "costs." *See* Mason, *supra* note 104, at 233 (discussing a number of approaches by Ohio courts in considering what a "cost" is under Rule 41(D)).

unless it is absolutely necessary.[126] Attorney fees, however, are not included in costs.[127] One possibility to discourage abuse is to amend Ohio Rule 41(A) to permit courts to award attorney fees as well as cost.[128]

Another possibility to discourage abuse is to expand Ohio Rule 54(D), which allows the prevailing party to be awarded costs.[129] Like above, costs do not include attorney fees. According to some federal courts, "Upon being voluntarily dismissed under Rule 41(a), a defendant may receive prevailing party status so that it can recoup its costs under Rule 54(d)."[130] Unfortunately, this appears to be a minority view.[131] For example, in *Szabo Food Service, Inc. v. Canteen Corp*., the Seventh Circuit Court of Appeals found that a defendant in an action that was voluntarily dismissed is not a prevailing party.[132] Ohio courts recognize that after a voluntary dismissal the "court retains jurisdiction in limited circumstances."[133] In Ohio, however, plaintiffs that voluntarily dismiss are not prevailing parties and, therefore, are not entitled to costs.[134] Not only is the law split on this issue, but also Rule

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[126] Rule 41(D) also helps to prevent forum shopping. Southard, *supra* note 109, at 368.

[127] Muze v. Mayfield, 573 N.E.2d 1078, 1079 (Ohio 1991) (finding Ohio Rule 41(D) does not permit the awarding of attorney fees); Campbell v. Gallimore, 591 N.E.2d 1, 2-3 (Ohio Ct. App. 1990) (rejecting the claim that Ohio Rule 41(D) allowed the award of attorney fees). A prior Ohio case, however, found otherwise. *See* Hosner v. Gibson Partner, Inc., 32 Ohio Misc. 2d 4, 4-5 (Ohio Ct. Com. Pl. 1986).

[128] *See* Southard, *supra* note 109, at 400 (advocating for a similar amendment to Federal Rule 41(d)).

[129] OHIO R. CIV. P. 54(D) ("Except when express provision therefor [sic] is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.").

[130] Southard, *supra* note 109, at 370 (citing Norris v. Turner, 637 F. Supp 117, 1124 (N.D. Alaska 1986) ("Where Rule 41(a)(2) is successfully invoked . . . the defendant is deemed to be the 'prevailing party' unless expressly provided otherwise.")); *see also* Corcoran v. Columbia Broad. Sys., 121 F.2d 575 (9th Cir. 1941) (awarding attorney's fees to the defendant in a copyright infringement case where the plaintiff voluntarily dismissed).

[131] *See* Santiago v. Victim Servs. Agency, 753 F.2d 219, 221 (2d Cir. 1985) ("Once the plaintiff has dismissed the action under [Federal Rule 41(a)(1)(i)], the court loses all jurisdiction over the action."), *abrogated by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). In *Cooter*, the U.S. Supreme Court allowed Federal Rule 11 sanctions after voluntary dismissal, meaning that even after voluntary dismissal, the trial court had jurisdiction. *Cooter*, 496 U.S. at 395. By contrast, other federal courts have used different reasoning coming to the conclusion that a defendant in an action that is voluntarily dismissed is *not* a prevailing party. *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987).

[132] *Szabo Food Serv*., 823 F.3d at 1076 ("A dismissal without prejudice under Rule 41(a)(1)(i) does not decide the case on the merits. The plaintiff may refile the complaint . . . ."). The court also reasoned that under Federal Rule 41(d), "[o]nly the filing of a second suit on the same claim allows the court to award the costs of the first case." *Id.* at 1077.

[133] Grossman v. Mathless & Mathless, 620 N.E.2d 160, 162 (Ohio Ct. App. 1993).

[134] *See* Champion Mall Corp. v. Bilbo Freight Lines, Inc., 611 N.E.2d 969, 971 (Ohio Ct. App. 1992). Frivolous claims, however, that are ultimately voluntarily dismissed are subject to Ohio Rule 11 sanctions. *See* OHIO R. CIV. P. 11.

54(D) does not resolve the problem of ever-increasing costs to the court or judicial system.

These approaches, however, are overreaching and unduly harsh. Not every plaintiff that utilizes voluntary dismissal is abusing the system. This approach is over-inclusive. Instead of discouraging abuses of voluntary dismissal, this approach only discourages plaintiffs from ever utilizing voluntary dismissal. Voluntary dismissal still has a role in Ohio's judicial system.[135] Only abuse of the rule should be discouraged.

B. Solution 2: Adopt the Federal Rule

The Federal Rules were designed to be very liberal and forgiving to parties involved. Prior to the adoption of the Federal Rules, cases were often dismissed due to the operation of harsh procedural rules. The code systems were considered too complex to understand, and this resulted in individuals being denied access to the courts. The current rules were meant to mitigate the effects of these harsh doctrines.[136] Plaintiffs are not foreclosed merely because they filed the wrong writ. With these liberal standards in the Federal Rules, the need for an absolute right to voluntary dismissal no longer exists.[137] The plaintiff, however, must still be given control of his or her case.

1. The Consequences of Limiting Dismissal to Early Stages of Litigation

Limiting dismissal to the early stages of trial insures that few resources have been expended. "The rule is designed to permit a disengagement of the parties at the behest of the plaintiff only in the early stages of a suit, before the defendant has expended time and effort in the preparation of his case."[138] With the ever-increasing costs and effort expended earlier in cases, this is never more true than now. The Advisory Committee weighed the costs and effort put forth when it amended the rule in 1946 to include the reference to a motion of summary judgment.[139] The preparation and research for trial is at least that of summary judgment. Also, the fact that the committee looked at effort and costs in expanding the rule suggests that this should also be a factor in deciding what rule Ohio should adopt.

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[135] Some commentators disagree. *See infra* Part V.D; *see infra* note 168 and accompanying text.

[136] Federal Rule 8 is a classic example of reform to make the requirements for pleading much lighter. *See* FED. R. CIV. P. 8.

[137] *See supra* note 90.

[138] Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir. 1971). This case concerned a franchise of Frostie Root Beer and whether it had been wrongfully cancelled. *Id.* at 916-17. Armstrong tried to give notice of voluntary dismissal after Frostie had given an answer. *Id.* at 916. Of course, it was not upheld and was dismissed in the trial court. *Id.* Apparently, Armstrong also failed to argue before the trial court that his notice of dismissal should have been treated as a motion for dismissal under Federal Rule 41(a)(2). *Id.*

[139] FED. R. CIV. P. 41 advisory committee's note (1946).

2. Time is Up: Now What?

The federal courts have decided that if the plaintiff asks for voluntary dismissal after the time period has passed, the court should grant it unless another party is injured.[140] The standard used is the "legal prejudice" standard.[141] Federal courts use a strict legal prejudice standard when examining voluntary dismissal:[142]

> In determining whether a defendant will suffer plain legal prejudice, a court should consider such factors as the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant.[143]

The mere "tactical advantages" provided for by voluntary dismissal do not constitute legal prejudice.[144] The costs to the judicial system are also not a factor. Only if the defendant is legally prejudiced will it be denied, regardless of whether he or she is "practical[ly] prejudice[d]."[145] The standard is high, and an appellate court will normally defer to the trial court's decision.[146] The federal courts consider the costs incurred by the defendant, but courts will usually side with the plaintiff when a motion for voluntary dismissal is requested before the trial has started.[147] Furthermore, circuits do not weigh these factors the same way, and many circuits consider additional factors.[148] The federal rule also provides no guidance on factors the trial court should consider when determining when it is appropriate to permit a voluntary dismissal.[149]

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[140] Regan, *supra* note 102, at 136.

[141] *Id.*

[142] Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994); Regan, *supra* note 102, at 136.

[143] *Grover*, 33 F.3d at 718.

[144] Regan, *supra* note 102, at 142.

[145] *Id.* at 138; *see also* Southard, *supra* note 109, at 371.

[146] *See* Kovalic v. DEC Int'l, Inc., 855 F.2d 471, 473 (7th Cir. 1988) ("The dismissal of a plaintiff's complaint without prejudice under Rule 41(a)(2) is within the sound discretion of the district court and may be reversed only if the appellant can establish that the court abused that discretion.").

[147] *See* Southard, *supra* note 109, at 371 ("When no prejudice exists, a motion for voluntary dismissal under Rule 41(a)(2) usually will be granted . . . ."); David J. Comeaux, Comment, *Avoiding Nonjudicious Nonsuits: Hearing the Defendant on Rule 41(A)(2) Motions*, 32 HOUS. L. REV. 159, 160 (1995) ("Today, courts still show deference to the common-law rule: while a court may consider the equities of both parties, the scales are tipped in the plaintiff's favor before a court begins its analysis.").

[148] Comeaux, *supra* note 147, at 177. These factors, however, can facilitate prediction of what a court might do. *Id.* at 177-78.

[149] *See* FED. R. CIV. P. 41(a)(2).

The Federal Rule, however, does give courts an opportunity to make the defendant whole. Even if there is no legal prejudice, a judge may mandate the payment of the defendant's costs and attorney fees as a condition to voluntary dismissal.[150] "[B]efore trial[, voluntary] dismissal should be allowed unless reasonable terms and conditions cannot make the defendant substantually [sic] whole . . . ."[151] A court will normally utilize the same factors in determining what conditions should be placed on the voluntary dismissal as those that are initially considered in determining whether to grant the dismissal.[152]

The Federal Rule addresses many of the issues present under the Ohio Rule; however, it presents a few problems as well. The Federal Rule balances the interest of both parties, but it fails to balance the interest of the judiciary. Plaintiffs would still be allowed to dismiss regardless of the damage done to the judiciary. The Federal Rule does cut down on tactical advantages to the plaintiff through voluntary dismissal by shortening the time the plaintiff has to dismiss without a court order. The Federal Rule fails, however, to provide a consistent balancing test for trial courts to use to determine the equities of the parties and when voluntary dismissal should be denied.

C. Solution 3: Adopt a Tested Rule Used by Other States

Like Ohio and the federal government, many other states have also reformed the law on voluntary dismissal. Ohio has forty-nine examples to examine the best way to discourage abuse of voluntary dismissal.[153] Many states have adopted the restrictive Federal Rule, while others have standards ranging in similarity from Ohio's law to the lenient common law.[154] The wide variety presents many possibilities and provides examples of the issues that arise from them.

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[150] Apparently "terms and conditions" is a quite common phrase that judges include when granting voluntary dismissal. Solimine & Lippert, *supra* note 27, at 380.

[151] Lipkin, *supra* note 7, at 986.

[152] Solimine & Lippert, *supra* note 27, at 380-81.

[153] Few states allow voluntary dismissal in certain circumstances much later than Ohio, but Ohio has clearly rejected these options by restricting voluntary dismissal. *See* ARK. R. CIV. P. 41(a)(1) (limiting voluntary dismissal to before submission to jury or to the court); FLA. R. CIV. P. 1.420(a)(1) (limiting voluntary dismissal to before motion for summary judgment or if it is denied or not made before the jury retires or it is submitted to the court); NEB. REV. STAT. § 25-601 (2009) (limiting voluntary dismissal to before final submission to jury or court); OKLA. STAT. ANN. tit. 12, § 683(1) (West 2009) (limiting voluntary dismissal to before submission to jury or to the court); TENN. R. CIV. P. 41.01(1) (limiting voluntary dismissal to before the trial); VA. CODE ANN. § 8.01-380(A) (West 2009) (limiting voluntary dismissal to before motion to strike the evidence sustained or jury retires).

[154] CAL. CIV. PROC. CODE § 581(b)(1) (West 2009) (limiting voluntary dismissal to before actual commencement of trial); CONN. GEN. STAT. ANN. § 52-80 (West 2009) (limiting voluntary dismissal to before the second day of court); GA. CODE ANN. § 9-11-41(a)(1)(A) (West 2009) (limiting voluntary dismissal to before first witness is sworn); 735 ILL. COMP. STAT. ANN. 5/2-1009(a) (West 2009) (limiting voluntary dismissal to before trial begins); LA. CODE CIV. PROC. ANN. art. 1671 (2008) (limiting voluntary dismissal to before the defendant makes an appearance of record); N.C. R. CIV. P. 41(a)(1)(i) (limiting voluntary dismissal to before plaintiff rests his case); PA. R. CIV. P. 229(a) (limiting voluntary dismissal to before the start of the trial); TEX. R. CIV. P. 162 (limiting voluntary dismissal to before the plaintiff has

1. States that Modify the Federal Rule

In New York, a plaintiff may dismiss a cause of action without an order from the court by giving notice at any time before either a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier.[155] This approach basically eliminates the plaintiff's absolute right to voluntarily dismiss.[156] Under this rule, a plaintiff may only voluntarily dismiss without a court order until a responsive pleading has been filed or within twenty days. Under the Federal Rule, when a defendant is slow to file an answer or a motion for summary judgment, the plaintiff is given more time for voluntary dismissal. Unlike the Federal Rule, plaintiffs under the New York Rule are not rewarded by an inattentive or indifferent defendant.

Another key difference from the Federal Rule is New York's approach to discretion after the time for the absolute right of voluntary dismissal has passed. New York courts seem to have a presumption in favor of allowing voluntary dismissal. "[U]nless the defendant's substantial rights are prejudiced or some other injustice will result," New York courts will allow the voluntary dismissal.[157] This approach could effectively protect the plaintiff's right to dismiss while still protecting the defendant's rights and protecting him or her from abuse of this power.

Under the New York regime, a plaintiff may still use the rule for strategic reasons, but New York narrows the acceptable strategic reasons.[158] Plaintiffs could, however, still file and voluntarily dismiss within the twenty-day window, but the expense the defendants could incur over such a short time would be limited. New York's Rule is a step in the right direction in limiting abuse of the voluntary dismissal while still providing the plaintiff with the option of voluntary dismissal.

In Wisconsin, a plaintiff may dismiss "any time before service by an adverse party of responsive pleading or motion."[159] Similar to the federal rule, after the time allowed for the absolute right to voluntary dismissal has passed, the discretion to permit voluntary dismissal lies with the court.[160] The Wisconsin Rule differs with regard to the balancing test utilized in the determination of whether a voluntary

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introduced all his evidence); WASH. R. CIV. P. 41(a)(1)(B) (limiting voluntary dismissal to before plaintiff rests his case).

[155] N.Y. C.P.L.R. 3217(a)(1) (McKinney 2009). A party can discontinue without order from the court:

> [B]y filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action.

Id. at 32.

[156] Regan, *supra* note 102, at 141.

[157] *Id.*

[158] *See id.*

[159] WIS. STAT. ANN. § 805.04(1) (West 2009).

[160] *Id.* § 805.04(2) ("[A]n action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.").

dismissal should be permitted.[161] Wisconsin has not adopted the narrow legal prejudice standard of the federal courts.[162] Instead, Wisconsin courts weigh not only the interests of the parties but also the policy concerns for the "efficient use of judicial resources."[163] Wisconsin's doctrine was created through a long and arduous process of judicial interpretation that, at times, left considerable uncertainty as to the precedential value of past decisions.[164] Despite the few uncertainties in the Wisconsin balancing test, it provides further protection for the defendant with insignificant costs to the plaintiff.

The approach taken by New York and Wisconsin demonstrates that the Federal Rule may be adopted and altered to lessen any unnecessary hardship that the Federal Rule creates. Although these examples are not perfect and do not solve all the problems, they do provide insight. The rules these states have created have been tested and may be more likely to function better in the setting of a state court. The success of these states in eliminating such hardships provides a strong argument for adopting the Federal Rule or a modification of the Federal Rule.

2. States that Retain Limited Variations of the Common Law Rule of Voluntary Dismissal

Additionally, two other states have addressed the specific abuses that Ohio courts and defendants face under the current rule. Specifically, both Oregon and Iowa provide the absolute right to voluntarily dismiss up to a few days before trial.[165] This

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[161] Regan, *supra* note 102, at 144. Wisconsin courts also use many factors that the federal courts consider when determining whether a voluntary dismissal should be granted:

> Factors to consider when reviewing a motion for voluntary dismissal include: "[1] the plaintiff's diligence in bringing the motion; [2] any 'undue vexatiousness' on the plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss."

Clark v. Mudge, 599 N.W.2d 67, 70 (Wis. Ct. App. 1999) (quoted source omitted in original).

[162] *Clark*, 599 N.W.2d at 70. "A plaintiff does not have an absolute right to discontinue his action. Leave to discontinue may be denied in the discretion of the court if the rights of defendants, third parties, or the public will be substantially prejudiced by discontinuance." Russell v. Johnson, 111 N.W.2d 193, 196 (Wis. 1961). Substantial prejudice is different than the legal prejudice the federal courts use. *See supra* Part V.B.2.

[163] Regan, *supra* note 102, at 145. "Such a motion involves the exercise of judicial discretion and power in weighing the merits for granting dismissal. Public as well as private interests are involved . . . . The public interest includes efficient judicial administration." Monson v. Monson, 271 N.W.2d 137, 141 (Wis. Ct. App. 1978).

[164] *See Russell*, 111 N.W.2d at 196 (applying the same standard as in *Burling* to a case that was *not* a divorce case); Burling v. Burling, 82 N.W.2d 807, 808 (Wis. 1957) (finding that a court may deny a motion for voluntary dismissal if, among other things, "the public will be substantially prejudiced by discontinuance"); *Monson*, 271 N.W.2d at 141 (expanding the public interest to include "efficient judicial administration"); *supra* notes 162-163 and accompanying text. One commentator brought to light the idea that the solution presented in *Monson* might apply only in matrimonial dispute cases but argued against that rationale. Regan, *supra* note 102, at 145.

[165] IOWA R. CIV. P. 1.943 (limiting the absolute right of voluntary dismissal to "until ten days before the trial is scheduled to begin"); OR. R. CIV. P. 54(A)(1) (limiting the absolute

solution deals directly with the harshness caused by allowing a plaintiff to dismiss on the eve of a trial. This solution leaves enough time to save defendants some expense and allows the court to reschedule other proceedings to ease the pressure on the overflowing dockets.[166] This solution is great for the limited problem of eleventh-hour dismissals.

This approach, however, is both over-inclusive and under-inclusive. It is under-inclusive in that it fails to reign in conspicuous abuse of the right to voluntarily dismiss. In many cases, discovery and pre-trial issues are very costly and time consuming, but these rules protect only the expense incurred in the few days before trial. The short time limit may help the courts to a small degree, but it still leaves defendants open to considerable harm. Also, it does not foreclose the plaintiff's use of voluntary dismissal for purely strategic reasons; it limits only the most extreme eleventh-hour dismissals. This approach is also over-inclusive by reaching situations that are not even close to the eleventh-hour dismissals. The limit set by Iowa refers to scheduled trial date.[167] If the trial date is moved, the Iowa Rule would punish plaintiffs to whom the law was not intended reach.

D. Solution 4: Eliminate Voluntary Dismissal Except with Court Order

Does the Federal Rule concerning voluntary dismissal provide enough protection? Some argue that all voluntary dismissals should fall under the discretion of the court.[168] *Harvey Aluminum, Inc. v. American Cyanamid, Co.*,[169] is an example of a court that chose to use its discretion to decide whether to allow a voluntary dismissal even though the Federal Rule gave the plaintiff an absolute right to dismiss.[170] In addition to a few courts finding for discretion in all voluntary dismissals, many commentators have also argued for it.[171] A simple deletion of Federal Rule 41(a)(1) would leave voluntary dismissal solely in the discretion of the

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right of voluntary dismissal to "not less than five days prior to the day of the trial if no counterclaim has been pleaded"). Ohio considered this option as well, but it was ultimately defeated. *See supra* note 120.

[166] Solimine & Lippert, *supra* note 27, at 383-84 (discussing a movement in Ohio to adopt a similar rule limiting voluntary dismissals after five days prior to the scheduled commencement of the trial); Mason, *supra* note 104, at 248 (suggesting a time limit of one month before trial as the cutoff point for the plaintiff's right to voluntary dismissal through notice).

[167] IOWA R. CIV. P. 1.943.

[168] *See Absolute Dismissal*, *supra* note 40, at 743; Note, *Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, 1962 DUKE L.J. 285, 289-90.

[169] Harvey Aluminum, Inc. v. Am. Cyanamid Co., 203 F.2d 105 (2d Cir. 1953). This ruling is directly adverse to what the language of the rule states. It is clear that if notice has been made before an answer or a motion for summary judgment, then there is no discretion by the court.

[170] *Id.* at 105.

[171] *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Voluntary Nonsuit*, *supra* note 40, at 743 (Written shortly after *Harvey*, the article concludes that the confusion in the law could be easily avoided by getting rid of any absolute right to voluntary dismissal.).

court.[172] Many courts, however, have refused to expand the rule. In *Pilot Freight Carriers, Inc. v. International Bros. of Teamsters*,[173] the Fifth Circuit criticized the *Harvey* decision because of the difficulty of dealing in the subjective factors the court considered.[174]

Others have argued for a more limited revision to the Federal Rule. Proponents of a limited revision to the Federal Rule argue that it should be amended to limit voluntary dismissal when a plaintiff is requesting affirmative relief—like a preliminary injunction.[175] When a plaintiff requests affirmative relief—like in *Harvey*—an answer or a motion for summary judgment are normally filed much later. In *Harvey*, no answer or motion for summary judgment was filed, but when the preliminary injunction failed, the plaintiff voluntarily dismissed.[176] There is no doubt that the defendant expended a considerable amount of resources in defending the preliminary injunction, but the Federal Rule concerning voluntary dismissal permits dismissal. A limited revision would be beneficial to avoid undue expense to the defendant.

Completely abolishing the plaintiff's right to voluntary dismissal without an order from the court is injurious to plaintiffs and should not be considered. Many plaintiffs have valid reasons for voluntary dismissals, and these reasons are so persuasive they should be protected by any rule on voluntary dismissals. First, the plaintiff has good reason to voluntarily dismiss when he or she is plainly not ready.[177] This aspect is the hardest reason to accept because it leaves the rule open to abuse. Specifically, it is nearly impossible to know the plaintiff's true reason for voluntary dismissal.[178] The plaintiff's unpreparedness may arise from his or her own negligence. Conversely, the plaintiff may have discovered new evidence that would lead to another cause of action. The surprise caused by such a situation is justified, and the plaintiff should be allowed time to develop his or her case.

Second, the plaintiff may want to re-file elsewhere with a longer statute of limitations.[179] If the plaintiff made a mistake and filed too late in one jurisdiction, it would be unfair to deprive him or her of the ability to file in the correct place. In many instances, this situation might arise due to negligence, but quite a few situations occur absent negligence. A great example is when a plaintiff realizes that he or she has sued the wrong defendant and attempts to add the appropriate

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[172] *See Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, *supra* note 168, at 289-90. A similar deletion of the Ohio Rule 41(A)(1)(a) would create the same outcome.

[173] Pilot Freight Carriers, Inc. v. Int'l Bros. of Teamsters, 506 F.2d 914 (5th Cir. 1975).

[174] *Id.* at 916.

[175] *Absolute Dismissal*, *supra* note 40, at 743. The author, while also recognizing that *Harvey* demonstrates a major change, points out that "it is in line with the desirable trend away from plaintiff's common law right of unrestricted dismissal." *Id.* at 742.

[176] *Harvey*, 203 F.2d at 107. The plaintiff desired to pursue the action in another country. *Id.*

[177] Comeaux, *supra* note 147, at 163.

[178] *Id.* at 162.

[179] *Id.* at 166.

defendant after the statute of limitations occur.[180] Third, the plaintiff has a legitimate right to voluntary dismissal in cases where he or she seeks a jury trial.[181] If a plaintiff sues in admiralty, he or she does not have the right to a trial by jury.[182] The plaintiff might realize later that he or she was able to sue in a regular civil court and gain the opportunity to have a jury trial. The plaintiff should be given the opportunity to change to a court where a jury trial would be available, especially if the plaintiff was unaware of the jury opportunity before filing the complaint in admiralty court.

This list is in no way comprehensive. Many other reasons have been mentioned above, and many more reasons might develop in the future. The courts realize that numerous reasons for voluntary dismissal are legitimate, and ignoring those reasons would be harmful to the administration of justice. In developing a rule, these practical reasons must constantly be used to assess the burden that a rule would have on the interests of the plaintiffs. The federal courts also consider the plaintiff's reasons when deliberating whether to grant a motion for voluntary dismissal under Rule 41(a)(2).[183] Furthermore, if a judge were to deny a motion for voluntary dismissal in cases of surprise or hardship, the judge would be abusing his or her discretion.[184] Refusing to allow plaintiffs to voluntarily dismiss in any instance will not solve the problems of abuse.[185]

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[180] *Id.* at 167-68 (discussing this exact situation).

[181] *Id.* at 171.

[182] *Id.*

[183] *Id.* at 162. The federal courts consider other factors as well:

> In assessing prejudice, factors to consider include (1) the excessive and duplicative expenses of a second litigation; (2) defendant's effort and expense in preparing for trial; (3) whether the plaintiff delayed or was dilatory in prosecuting the action; (4) insufficient explanation for taking nonsuit; and (5) the filings of motions for summary judgment.

Southard, *supra* note 109, at 371.

[184] Solimine & Lippert, *supra* note 27, at 387-88.

[185] Head, *supra* note 1, at 27 (arguing that the plaintiff should at least be able to see the defense before making the decision to continue); Solimine & Lippert, *supra* note 27, at 396 (describing this view as "too draconian").

VI. PROPOSED JUDICIAL APPROACH[186]

A. A Comprehensive Approach

The best approach for Ohio is a comprehensive approach to voluntary dismissal. A balance has been struck by extracting the best ideas from the federal and state rules. Shortening the time permitted for voluntary dismissal up to the answer or summary judgment puts the length of time for the absolute right of voluntary dismissal in the hands of the defendant. By being proactive, the defendant can shorten that time period. In turn, this threat from the defendant forces the plaintiff to evaluate and accomplish more work on his or her case to determine whether he or she should dismiss earlier. Ohio should not adopt the New York standard that takes away plaintiff's right to voluntary dismissal without a court order after twenty days. If a defendant is lazy and slow to answer, then the plaintiff should be given more time to dismiss. The adoption of a rule similar to the Wisconsin Rule provides the court with guidelines that include the interest of the court. It also removes the harshness from the Federal Rule.

First, this modified Federal Rule balances the interests of all the parties.[187] The modified Federal Rule anticipates situations where the plaintiff might need to dismiss because of surprise or emergency. Plaintiffs would still be able to dismiss up to the eve of trial permitting approval from the court. The trial court judge "is perfectly capable of protecting the plaintiff in cases of hardship or surprise."[188] This allows the court more "flexibility in protecting rights and defending against injustices."[189] The Federal Rule, however, does not weigh the interest of the courts. Taking the lead from Wisconsin, the rule should be modified to add this to the discretion of the court.

Second, the proposed rule complements Ohio's current civil procedure rules. Ohio has adopted the Federal Rules in most areas. The rules are much more liberal and flexible than previous systems. With the Ohio Rules' liberal stance on pleadings and continuances, it seems unnecessary for the plaintiff to have the absolute right to voluntarily dismiss.[190] Along the same lines, it seems more appropriate considering the changes in the way trials are managed. With increasingly complicated discovery

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[186] Any proposed action to change the rules of civil procedure in Ohio *must* be a judicial action. "The supreme court shall prescribe rules governing practice and procedure in all courts of the state . . . ." OHIO CONST. art. IV, § 5(B); *see also* Rockey v. 84 Lumber Co., 611 N.E.2d 789 (Ohio 1993) (invalidating a statute that conflicted with an Ohio Rule of Civil Procedure on the grounds that the Ohio Constitution gave power to make rules of procedure to the Supreme Court of Ohio). For a great discussion on separation of powers in Ohio, see Curtis Rodebush, *Separation of Powers in Ohio: A Critical Analysis*, 51 CLEV. ST. L. REV. 505 (2004).

[187] Clinton H. McKay, *Voluntary Dismissals and Non-Suits in Tennessee*, 15 TENN. L. REV. 787, 789 (1937-1939); *see also* Sweeney, *supra* note 88, at 766.

[188] Lipkin, *supra* note 7, at 987.

[189] Tucker, *supra* note 18, at 366.

[190] *See supra* note 90.

and judges engaging in more proactive case management, the modified Federal Rule is advantageous.[191]

Third, the modified Federal Rule offers flexibility. While the federal courts have chosen a strict view on judicial discretion, other states like New York and Wisconsin have broader discretion for the court. Conversely, Ohio should guide judicial discretion and suggest factors that judges should consider when reviewing a motion for voluntary dismissal. These factors should reflect the abuses that Ohio is attempting to avoid. Not only the does the Federal Rule cut off the absolute right of voluntary dismissal earlier, but Ohio can also format it to fit the special needs of Ohio. Like New York and Wisconsin, Ohio should adopt the Federal Rule but give more clarity to the discretion of the court. Limiting the court's discretion may appease the powerful plaintiff's bar in Ohio. If voluntary dismissal is requested after an answer has been filed, the judge may require terms and conditions. In this instance, if the judge finds the reasons to be lacking, he or she may award the defendant costs or attorney's fees.[192]

B. Sample Language

The Ohio Rule on voluntary dismissal should be amended to allow voluntary dismissal by notice until "the opposing party serves either an answer or a motion for summary judgment." This would effectively adopt the Federal Rule as to the time when the plaintiff would lose his or her right to dismiss without an order of the court. Furthermore, the Ohio Rule allowing dismissal by order of the court should be amended to state: "The court shall consider the interests of all the parties including the court's interest in the efficient use of judicial resources." This allows courts to consider the efficient use of judicial resources as a factor in determining whether to grant a motion for dismissal or not. Finally, the Ohio Rule should be further amended to list factors that the court should consider. This list should not be exhaustive but should include time, expense, and diligence of all the parties involved.

VII. CONCLUSION

The purpose of Ohio's Rules of Civil Procedure is "to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice."[193] Ohio's Rule concerning voluntary dismissal fails to meet these purposes. The law not only facilitates abuse; it encourages abuse through factors like the savings statute. These abuses result in further delay and unnecessary expenses to both the courts and the parties involved. Furthermore, the Ohio Rule hinders the efficient administration of justice. "No clearer case of delay to the judicial process, unnecessary expense to an opposing party, and encumbering of the court's docket exists than when a case is voluntarily dismissed by a party and then refiled."[194]

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[191] Tucker, *supra* note 18, at 367.

[192] Southard, *supra* note 109, at 371.

[193] OHIO R. CIV. P. 1(B).

[194] Hosner v. Gibson Partner, Inc., 32 Ohio Misc. 2d 4, 4-5 (Ohio Ct. Com. Pl. 1986).

The modified Federal Rule, however, restricts the opportunity for abuse while limiting possible expenses to the parties and the judicial system. First, the proposed rule balances the interests of all the parties.[195] Second, the proposed rule is complementary to the procedural system that Ohio has adopted.[196] Third, the proposed rule provides judicial discretion to prevent abuses but restricts discretion so that it will not be overbearing.[197]

The plaintiff's right to voluntary dismissal is important, but it should be restricted. Many valid reasons exist for plaintiffs to voluntarily dismiss a cause of action.[198] Under the modified Federal Rule, plaintiffs would still have that right up to trial, as long as their reasons are valid. The judge may award costs to the defendant, but that is not an overbearing limitation. The modified Federal Rule on voluntary dismissal bars abuse of the rule without barring voluntary dismissal.

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[195] *See supra* notes 187-189 and accompanying text.

[196] *See supra* notes 90-91 and accompanying text.

[197] *See supra* Part VI.A.

[198] *See supra* Part V.D.