Supreme Court Advisory Committee

Date: December 7, 2021

Report of Subcommittee on Rules 15-165a.

Subject: Possible amendments to TRCP 162

1. On October 25, 2021, Chief Justice Hecht sent a letter to SCAC Chair Chip Babcock referring a suggestion from Judge Robert Schaffer to amend Tex. R. Civ. P. 162. Judge Schaffer, of the 152nd District Court in Harris County, wrote in his September 20, 2021 email:

> There is a conflict in the rules as it relates to non-suits of claims in which minors are parties.
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> Rule 162 says, "at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." Caselaw says that "granting a non-suit is a ministerial act, and a plaintiff's right to a non-suit exists from the moment a written motion is filed or an oral motion is made in open court, unless the defendant has, prior to that time, sought affirmative relief."
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> Rule 44 states that when a next of friend files a lawsuit, "Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit."
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> The conflict is occurs when we get a motion for a non-suit of a lawsuit in which minors are making claims. When this happens I have set a status conference to determine whether a settlement is being made for a minor in which the minor is getting money that is being paid directly to the minor's parent. One of my colleagues has this situation in which the case settled and 3 minors received around $10,000 each and that money was paid directly to the parent of the minors. After the settlement was concluded, the parties filed a motion for non-suit. There was no minor settlement hearing and the court did not have an opportunity to hear the evidence to determine whether

the settlement was in the minor's best interest. If Rule 162 applied, we would have dismiss the case without any determination as to whether the settlement was in the minor's best interest or whether the minor or next friend on behalf of the minor received any money.

It feels like Rule 162 needs to be amended to allow a trial court to approve or reject a minor settlement before a non-suit is granted. We would suggest the following change to the second paragraph of Rule 162:

> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court**. Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the Court pursuant to Rule 44.** Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

This suggestion is made to ensure that the court's ability to oversee claims involving minors is not impaired and the minor's interest is protected.

Robert K. Schaffer
Judge, 152nd District Court

A portion of the Subcommittee likes Judge Shaffer's suggestion, and would adopt it. One subcommittee members suggested that a rule change is not necessary because Rule 44, being more specific than Rule 162, is controlling because the specific prevails over the general. This member of the subcommittee suggests that the full committee consider three alternatives: (1) is it better to let the case law develop and, eventually, have the Court weigh in about this potential conflict in the two rules; or (2) is it better to add a comment after Rule 162 (e.g., something along the lines suggested by Judge Shaffer (i.e.,"Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the Court pursuant to Rule 44"); (3) why would amending the rule be better than either of these other options?

Rule 162 has several other problems that would not be resolved by this change. Here is TRCP 162 as presently written:

> RULE 162. DISMISSAL OR NON-SUIT
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> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.
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> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

The Committee has not settled on recommendations for the following questions, so they are presented for consideration by the full Supreme Court Advisory Committee:

1. Is a non-suit exclusively the action of a party while dismissal is exclusively the action of a court? Rule 162 says "the plaintiff may dismiss a case." But case law says the termination of plenary power runs from the court signing an order of dismissal. Should we make it clear that non-suit is a two-step process: first a non-suit by a party and then a dismissal by the court? Or should we merge the two concepts into one, and call it either non-suit or dismissal? Or is the plaintiff free to either non-suit or dismiss, if they are different things?

2. What is the effect of a non-suit where the court never signs a written order dismissing the plaintiff's claims? Does plenary power go on forever?

3. How is an oral dismissal "entered in the minutes"? How is an oral non-suit "entered in the minutes"? Does the clerk hand-write the oral dismissal or non-suit on paper minutes or type them into electronic minutes?

4. What does "without necessity of court order" mean in the second sentence of the

rule, which says: "Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order"? Does that mean "even in the absence of an order of dismissal"? Can we delete that clause without changing the meaning of the Rule? If not, can we rewrite the sentence so that its meaning is clearer?

5. The entire second paragraph of Rule 162 says that dismissal is subject to counterclaims, but does not say the same thing for non-suit. Do the rules of the second paragraph apply to a non-suit? If so, why don't we say so? If not, then what is the effect of a non-suit (without dismissal) on pending counterclaims?

6. The Supreme Court in *University of Texas v. Estate of Blackmon* said that a court can defer signing an order of dismissal to allow a reasonable amount of time to hear costs, attorneys fees, sanctions, etc. and other matters collateral to the merits. Should the rule say that: "A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, ~~as~~ to be determined by the court within a reasonable time."

7. Do we need to add a Comment to Rule 162 to help clarify any of this?

McDonald & Carlson, TEXAS CIVIL PRACTICE 2d § 27:48 (1999) says: "A plaintiff dismisses a case by filing a motion for nonsuit with the clerk of the court. If the motion is timely, as discussed below, nothing else is required; the nonsuit is effective the moment it is filed and it must be entered in the minutes. ... No order ever needs to be entered." [citing to *Strawder v. Thomas*, 846 S.W.2d 51, 58-59 (Tex. App.–Corpus Christi 1992, no writ).]

In *Epps v. Fowler*, 351 S.W.3d 862, 868-70 (Tex. 2011), the Court wrote:

> In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence. TEX.R. CIV. P. 162. No court order is required. *Id.*; *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex.2010). A nonsuit terminates a case "from `the moment the motion is filed.'" *Joachim*, 315 S.W.3d at 862 (quoting *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex.2006) (per curiam)). At the same time, a nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id.* at 863; TEX.R. CIV. P. 162. When a case is nonsuited without prejudice, res judicata does not bar relitigation of the same claims. *Klein v.*

Dooley, 949 S.W.2d 307, 307 (Tex. 1997).
* * *
[W]e have no doubt that a defendant who is the beneficiary of a nonsuit with prejudice would be a prevailing party. ... In contrast, a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to re-file the same claims seeking the same relief.
* * *
[W]e hold that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

In *University of Texas v. Estate of Blackmon*, 195 S.W.3d 98, 100-01 (Tex. 2006) (per curiam), the Court wrote:

Under the Texas Rules of Civil Procedure, "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." TEX. R. CIV. P. 162. Rule 162 applies in this case because Shultz filed the nonsuit while this matter was pending on interlocutory appeal from UTMB's pretrial plea to the jurisdiction. Under these circumstances, the nonsuit extinguishes a case or controversy from "the moment the motion is filed" or an oral motion is made in open court; the only requirement is "the mere filing of the motion with the clerk of the court." *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990); *see also Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex. 1982). While the date on which the trial court signs an order dismissing the suit is the "starting point for determining when a trial court's plenary power expires," a nonsuit is effective when it is filed. *In re Bennett*, 960 S.W.2d 35, 38 (Tex.1997); TEX. R. CIV. P. 329b. The trial court generally has no discretion to refuse to dismiss the suit, and its order doing so is ministerial. *In re Bennett*, 960 S.W.2d at 38; *Shadowbrook*, 783 S.W.2d at 211.

Of course, the trial court need not immediately dismiss the suit when notice of nonsuit is filed. Rule 162 states that the plaintiff's right to nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk," and a dismissal "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal." TEX. R. CIV. P. 162.

> A claim for affirmative relief must allege a cause of action, independent of the plaintiff's claim, on which the claimant could recover compensation or relief, even if the plaintiff abandons or is unable to establish his cause of action. *BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 841 (Tex.1990). UTMB has not raised a claim for affirmative relief, but it did request costs in its plea to the jurisdiction. Rule 162 permits the trial court to hold hearings and enter orders affecting costs, attorney's fees, and sanctions, even after notice of nonsuit is filed, while the court retains plenary power. *In re Bennett*, 960 S.W.2d at 38. Thus, the trial court has discretion to defer signing an order of dismissal so that it can "allow a reasonable amount of time" for holding hearings on these matters which are "collateral to the merits of the underlying case." *Id.* at 38-39. Although the Rule permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot.

In *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862-63 (Tex. 2010), the Court wrote:

> A party has an absolute right to file a nonsuit, and a trial court is without discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain. *See Villafani v. Trejo*, 251 S.W.3d 466, 468-69 (Tex. 2008); *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (per curiam); *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991). A nonsuit "extinguishes a case or controversy from 'the moment the motion is filed' or an oral motion is made in open court; the only requirement is 'the mere filing of the motion with the clerk of the court.'" *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex.2006) (per curiam) (quoting *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990) (per curiam)). It renders the merits of the nonsuited case moot. *See Villafani*, 251 S.W.3d at 469 ("One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable."); *Shultz*, 195 S.W.3d at 101 ("Although [Rule 162] permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot."); *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990) ("As a consequence of the trial court's granting the nonsuit, the temporary injunction ceased to exist and the appeal became moot.... It was not necessary for the trial court to enter such a separate order because when the underlying action was dismissed, the

> temporary injunction dissolved automatically.") (citation omitted).
> * * *
> After a nonsuit, a trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit, as well as jurisdiction over any remaining counter-claims. *See Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (per curiam) (holding that a trial court has authority to decide a motion for sanctions while it retains plenary power, even after a nonsuit is taken); TEX.R. CIV. P. 162 ("Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk.").
> * * *
> Many litigants use a nonsuit as a procedural device to effectuate a settlement agreement, intentionally dismissing claims with prejudice. Indeed, in this case Joachim had taken a nonsuit with the first trial court "dismissing with prejudice all of Plaintiff's claims" against another defendant with whom Joachim had settled, before he filed the nonsuit as to Travelers. Just as the trial court has jurisdiction to enter a dismissal with prejudice upon the filing of a nonsuit to effectuate a settlement agreement, it must also have jurisdiction to enter a dismissal with prejudice in other nonsuit situations.

In *Valencia v. McLendon*, No. 14-18-00122-CV (Tex. App.–Houston [14th Dist.] Dec. 19, 2019, no pet.) (mem. op.), the Court wrote:

> A nonsuit of the plaintiff's cause of action," therefore, "is not an adjudication of the rights of the parties and does not extend to the merits of the action; it merely puts them back in the position they were in before the lawsuit was brought." *Waterman v. Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 398 (Tex. App.-Houston [1st Dist.] 2011, pet. denied)....

In *Salinas v. Aguilar*, No. 04-11-00260-CV (Tex.. App.–San Antonio, no pet.) (mem. op.), the Court said:

> Because the trial court retained jurisdiction to rule on the motions for sanctions for 105 days from the date the nonsuit was signed, the trial court did not err in setting the motions for hearing on March 29, 2011. However, appellants agreed to reset the hearing on the pending motions to May 31, 2011, which was past the date on which the trial court's plenary power

> expired. The record contains no other efforts by appellants to have the motions heard within the trial court's plenary power. Because the motions for sanctions were never heard or expressly ruled upon, there is nothing before us to review.

In *McDougal v. McDougal*, No. 07-16-00422-CV (Tex. App.–Amarillo 2018, pet. denied) (mem. op.), the Court wrote:

> It is settled, however, that the signing by the trial court of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point to determine when the trial court's plenary power expires. *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (orig. proceeding) (per curiam).

In *Strawder v. Thomas*, 846 S.W.2d 51, 50 (Tex. App.--Corpus Christi 1992, no writ), the Court wrote:

> The case law surrounding Rule 162 clearly reflects that taking of a nonsuit does not necessitate the filing of any other pleadings or observing other technical rules, but merely requires the appearance before the court or clerk by a plaintiff, or intervenor, through its representative or attorney, and the transmittal to the clerk of the party's abandoning its claims. No particular procedure is required to take a nonsuit. *Greenberg*, 640 S.W.2d at 872; *Orion Investments, Inc. v. Dunaway & Associates, Inc.*, 760 S.W.2d 371, 373 (Tex. App.--Fort Worth 1988, writ denied). The Supreme Court has held that the rule is to be liberally construed in favor of the right to nonsuit, *Greenberg*, 640 S.W.2d at 872, and that it should not be given strict or technical construction. *Smith v. Columbian Carbon Co.*, 145 Tex. 478, 198 S.W.2d 727, 728 (1947). The rule is equally applicable to intervenors claiming affirmative relief. *Boswell, O'Toole, Davis & Pickering v. Townsend*, 546 S.W.2d 380, 381 (Tex.Civ. App.—Beaumont 1977, no writ). The Texas courts have uniformly held that presentation to the court of a nonsuit in some fashion and entry of that presentation upon the court's calendar ends the case with regard to any claims involving that party, except for claims for affirmative relief then pending against the nonsuiting party; no order ever need be entered.

Respectfully submitted,
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Subcommittee Chair