

## NONSUIT IN VIRGINIA CIVIL TRIALS

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### I. INTRODUCTION

The voluntary nonsuit<sup>1</sup> is a potent weapon in the arsenal of a Virginia litigant,<sup>2</sup> primarily the plaintiff,<sup>3</sup> and it has been recog-

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1. All nonsuits in Virginia are voluntary. Unlike the practice in other jurisdictions, there is no compulsory or involuntary nonsuit in Virginia. While the court may recommend or advise the plaintiff to take a nonsuit, it cannot require an unwilling plaintiff to do so. *Thweat v. Finch*, 1 Va. (1 Wash.) 217, 219 (1793); *Ross v. Gill*, 1 Va. (1 Wash.) 87, 89 (1792); James L. Tucker, Note, *The Voluntary Nonsuit in Virginia*, 7 WM. & MARY L. REV. 357, 357 (1966).

2. See Jason W. Konvicka, *Practice Pointer: News on Nonsuit from Supreme Court of Virginia Is Good*, 18 J. VA. TRIAL LAW. ASS'N 2, 2 (2006) ("For a civil trial lawyer in Virginia, few rights are as sacred as the absolute right to take a nonsuit."); accord *Goodman v. Hamman*, 19 Va. App. 71, 74, 448 S.E.2d 677, 679 (1994); see also *Trout v. Commonwealth Transp. Comm'r of Va.*, 241 Va. 69, 73, 400 S.E.2d 172, 174 (1991) ("The right to take a nonsuit . . . is a powerful tactical weapon in the hands of a plaintiff.").

One of the reasons that a nonsuit is considered favorable to Virginia plaintiffs, inequitable to Virginia defendants, and unduly burdensome to the Virginia judicial system is its ultimate effect. "[A] nonsuit is a procedural step that terminates pending litigation but which leaves the issues of the case undecided." *Clark v. Clark*, 11 Va. App. 286, 298, 398 S.E.2d 82, 88 (1990) (citing *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 620, 93 S.E. 684, 687 (1917); *Mallory v. Taylor*, 90 Va. 348, 349, 18 S.E. 438, 439 (1893)). When a nonsuit order is entered, it puts an end to the pending litigation, leaving the situation as if the suit had never been filed, without precluding another suit for the same cause of action. *Ford Motor Co. v. Jones*, 266 Va. 404, 406, 587 S.E.2d 579, 581 (2003); *Thomas Gemmill, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 97, 184 S.E. 457, 458 (1936); *Mallory*, 90 Va. at 349, 18 S.E. at 439. The nonsuited case becomes concluded as to all claims and parties, and nothing remains to be done. *James v. James*, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002). Thus, where a plaintiff who prevails in general district court takes a nonsuit in the defendant's de novo appeal to circuit court, the effect is to nullify the entire suit as if it had never existed in either court. *Lewis v. Culpeper Cnty. Dep't of Soc. Servs.*, 50 Va. App. 160, 167, 647 S.E.2d 511, 514 (2007). The taking of a nonsuit carries down all of the previous rulings and orders in the case not consisting of dismissals with prejudice or otherwise eliminating claims or parties from the case. *Dalloul v. Agbey*, 255 Va. 511, 514, 499 S.E.2d 279, 281 (1998).

3. By the plain language of Virginia Code section 8.01-380, a defendant may nonsuit a counterclaim, cross-claim, or third-party claim. Virginia Code section 8.01-380 applies to any "action or claim," and refers to "a party," "the nonsuited party," and "the opposing

nized by common law and statute for hundreds of years.<sup>4</sup> Nevertheless, the Virginia nonsuit statute has long been controversial and the subject of sharp debate.<sup>5</sup> While it has been modified through the imposition of several conditions to give some degree of balance to the exercise of an otherwise unfettered right to nonsuit,<sup>6</sup> it is still in need of revamping. This article discusses the reasons why nonsuit, in its present form, despite prior statutory amendments, has become an insupportable anachronism and unduly burdensome to both defendants and the judicial system. I hope that this article will stimulate discussion, and provide an impetus for the Virginia General Assembly to correct the inefficiencies and inequities plaguing the current nonsuit procedures.

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party,” rather than to “the plaintiff” or “the defendant.” See *Khanna v. Dominion Bank of N. Va.*, 237 Va. 242, 245, 377 S.E.2d 378, 380 (1989) (nonsuit of counterclaim denied only because action had already been decided and announced); *RML Corp. v. Lincoln Window Prods., Inc.*, 67 Va. Cir. 545, 572–73 (2004) (City of Norfolk) (acknowledging propriety of defendants’ nonsuit of their third-party claims); *Bd. of Dirs. v. Harbour Point Bldg. Corp.*, No. CL00-1893, 2002 Va. Cir. LEXIS 421, at \*11 (Va. Cir. Ct. Oct. 25, 2002) (City of Virginia Beach) (unpublished letter opinion) (denying defendant’s motion to nonsuit its cross-claim solely because of another defendant’s pending cross-claim against it that could not be independently adjudicated); *Frank & Co., P.C. v. Amorosi*, No. 125895, 1994 WL 1031290, at \*1 (Va. Cir. Ct. Aug. 8, 1994) (Fairfax County) (unpublished decision) (permitting nonsuit of counterclaim); see also Tucker, *supra* note 1, at 361–62; ARTHUR WARRANT PHELPS, HANDBOOK OF VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 45 (3d ed. 1974). But see *Chizz Constr. Corp. v. Murphy*, Nos. 9962 & 10051, 1989 WL 651639, at \*1 (Va. Cir. Ct. July 24, 1989) (Loudoun County) (unpublished decision) (refusing to permit nonsuit of counterclaim because section 8.01-380 does not specifically refer to nonsuit of a counterclaim, cross-claim, or third-party claim, and applies only to original actions); FED. R. CIV. P. 41(c) (making the voluntary dismissal rule applicable to any counterclaim, cross-claim, or third-party claim).

4. See *infra* note 9.

5. See *Dunston v. Huang*, 709 F. Supp. 2d 414, 417 n.3 (E.D. Va. 2012) (noting that the Virginia nonsuit statute has long been controversial, and characterizing the various amendments previously made to section 8.01-380 as a response by the General Assembly to the sharp debate over the unfettered right to nonsuit awarded the plaintiff under the statute—a response triggered by the Boyd-Graves Conference in the 1970’s debate over the merits of the nonsuit statute).

6. “In the 1970s, the Boyd-Graves Conference—a civil law reform group composed equally of plaintiff and defense attorneys from the Virginia Bar—debated the merits of Virginia’s nonsuit statute and called for reform of the statute. The General Assembly responded.” *Id.* There were no substantive amendments to the nonsuit statute between 2007 and 2013. See *infra* Part II (discussing bills introduced in the 2013 Virginia General Assembly which, if enacted, would have affected the Virginia nonsuit practice); see also H.B. 1709, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 13, 2013, ch. 274, 2013 Va. Acts \_\_\_); S.B. 903, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 14, 2013, ch. 366, 2013 Va. Acts \_\_\_).

## II. THE HISTORICAL BACKGROUND OF NONSUIT IN VIRGINIA

Three excellent articles and a chapter in a treatise on Virginia practice and procedure provide an in-depth discussion of nonsuit in Virginia, including its historical background.<sup>7</sup> A short summary of that background is useful in considering the principles which govern its use.

Nonsuit at common law was well established in England by 1371,<sup>8</sup> and was recognized in Virginia almost from the beginning of the Commonwealth.<sup>9</sup> Virginia first codified nonsuit in actions at law tried by a jury in 1789,<sup>10</sup> but had no nonsuit statute appli-

7. See Kent Sinclair, *Nonsuits and the 21-day Rule*, in 2 VIRGINIA PRACTICE AND PROCEDURE 968 (2010); Bradford C. Jacob & Andrew Biondi, *Virginia's Nonsuit Statute: A Historical View and Defensive Strategies*, 14 J. CIV. LIT. 17 (2002); William W. Sweeney, *Nonsuit in Virginia*, 52 VA. L. REV. 751 (1966); Tucker, *supra* note 1. For additional background regarding nonsuit, see Thomas W. Conklin & Franklin A. Nachman, *The Rights of Defendants Against Plaintiffs Who Take Nonsuits*, 25 TRIAL LAW. GUIDE 237 (John J. Kennelly ed. 1981); S. Ben Barnes, *Voluntary Dismissal in Ohio: A Tale of an Ancient Procedure in a Modern World*, 57 CLEV. ST. L. REV. 921 (2009); Patrick Carroll, Note, *The Meaning of the Term "Trial" Within the Ohio Rules of Civil Procedure*, 25 CLEV. ST. L. REV. 515, 521–32 (1976); Neal C. Head, *The History and Development of Nonsuit*, 27 W. VA. L. Q. 20 (1921); Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J. L. REFORM 367 (2003); Carl F. Walker, *Discontinuance and Nonsuit*, 15 LA. L. REV. 185 (1954); 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 (1951).

8. See Head, *supra* note 7, at 21–22.

9. See Sweeney, *supra* note 7, at 755; see also, *Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 343, 732 S.E.2d 703, 706 (2012). In 1932, the General Assembly amended the nonsuit statute to provide:

A party shall not be allowed to suffer a non-suit, unless he do so before the jury retire from the bar. And after a non-suit no new proceeding on the same cause of action shall be had in any court other than that in which the non-suit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause be shown for proceeding in another court.

Act of Feb. 20, 1932, ch. 30, 1932 Va. Acts 24, 24 (codified as amended at VA. CODE ANN. § 6256 (Supp. 1932)). Nonsuit, which does not bar the bringing of another suit on the same cause of action, is distinguished from a “retraxit,” which is a voluntary renunciation by the plaintiff in open court of his suit and the cause thereof, and by which he forever loses his action. It is generally held that while an attorney has the implied authority to enter or take a nonsuit, he can enter a retraxit only when he has been expressly authorized to do so. *Va. Concrete Co. v. Bd. of Supervisors*, 197 Va. 821, 828, 91 S.E.2d 415, 420 (1956).

10. The 1789 act provided that “[e]very person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he do so before the jury retire from the bar.” Act of Dec. 4, 1789, ch. 28, 1789 Va. Acts 16, 17; see *Inova Health Care Servs.*, 284 Va. at 343, 732 S.E.2d at 706; see also *Moore v. Moore*, 218 Va. 790, 794, 240 S.E.2d 535, 537 (1978). That statute remained substantially unchanged until 1932 when, in apparent response to the criticism of the Supreme Court of Virginia, see *Md. Cas. Co. v. Cole*, 156 Va. 707, 713, 158 S.E. 873, 875 (1931), it was amended to require that a new proceeding on the same cause of action after nonsuit be brought only in the court in which the nonsuit was taken, unless the latter be without jurisdiction, not a proper venue, or other good cause be shown. Ch.

cable to bench trials until 1954.<sup>11</sup> Thereafter, the Virginia nonsuit statute was applied to bench trials,<sup>12</sup> both at law and in chancery.<sup>13</sup> Prior to 1954, there was no statute governing voluntary dismissal in chancery. To that point Virginia had followed the English chancery practice, giving the complainant the right to dismiss the suit at any time before the final decree, unless the affirmative rights of the defendant or others had attached.<sup>14</sup>

The 1954 nonsuit statute, as amended, read as follows: “A party shall not be allowed to suffer a nonsuit unless he do so before the jury retire from the bar or before the suit or action has been submitted to the court for decision or before a motion to strike the evidence has been sustained by the court.”<sup>15</sup>

The Supreme Court of Virginia, in *Inova Health Care Services*, explained the 1954 amendment as follows:

By including the word “suit” in the 1954 amendment, “the General Assembly changed the existing equity general rule and provided for a voluntary dismissal as a matter of right only up to the time the suit had been ‘submitted’ to the chancellor for decision.” Accordingly, “in a nonjury trial, at law or in equity . . . a nonsuit or dismissal without prejudice may not occur as a matter of right after the ‘suit or action has been submitted to the court for decision.’” We have previously recognized that the General Assembly, in adopting the 1954 amendment, “intended the statutory term ‘nonsuit’ to be used in a comprehensive sense (*i.e.*, voluntary termination by the plaintiff of pending litigation not precluding a later lawsuit upon the same cause of action), whether it be a nonsuit at law or a dismissal without prejudice in equity.” “This same comprehensive interpretation of the term [nonsuit] has been carried forward to the new nonsuit statute.”<sup>16</sup>

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30, 1932 Va. Acts 24 (codified as amended at VA. CODE ANN. § 6256 (Supp. 1932)). *But see* Act of Mar. 25, 1983, ch. 404, 1983 Va. Acts 497, 500 (codified as amended at VA. CODE ANN. § 8.01-380 (Cum. Supp. 1983)) (permitting a new proceeding in a federal court on the same action after a nonsuit in state court).

11. Act of Apr. 1, 1954, ch. 333, 1954 Va. Acts 411, 417 (codified as amended at VA. CODE ANN. § 8-220 (Cum. Supp. 1954)).

12. *Id.* (amending the first sentence of the statute).

13. *See Moore*, 218 Va. at 795, 240 S.E.2d at 538.

14. *Id.*, 240 S.E.2d at 537 (citing *Patterson v. Old Dominion Trust Co.*, 139 Va. 246, 255–56, 123 S.E. 549, 551 (1924); *Commonwealth v. Staunton Mut. Tel. Co.*, 134 Va. 291, 298, 114 S.E. 600, 602 (1922)).

15. VA. CODE ANN. § 8-220 (Cum. Supp. 1954).

16. *Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 343–44, 732 S.E.2d 703, 706–07 (2012) (internal citations omitted); *see also* VA. CODE ANN. § 8.01-380 (Cum. Supp. 2013).

In 1977, when former title 8 of the Code of 1950 was revised and recodified as present title 8.01,<sup>17</sup> Virginia Code section 8.01-380 (“Dismissal of an action by nonsuit”) adopted the provisions of former Virginia Code section 8-220 but, *inter alia*, restricted the number of nonsuits which might be taken in an action as a matter of right to one, and expanded former Virginia Code section 8-244 to cover cross-claims and third-party claims, as well as counterclaims.<sup>18</sup> The 1977 Virginia Code section 8.01-380 also permitted a nonsuit, over the defendant’s opposition, if the counterclaim(s), cross-claim(s), or third party claim(s) could remain pending for independent adjudication.<sup>19</sup>

In 1983, the General Assembly granted authority to institute a new proceeding in a federal court on the same cause of action after nonsuit in state court.<sup>20</sup> The next amendment to current Virginia Code section 8.01-380 (“Dismissal of action by nonsuit”)<sup>21</sup> occurred in 1991 and prohibited dismissal of a matter if an improper venue had been chosen after nonsuit. It also authorized transfer to the proper venue upon motion of any party.<sup>22</sup> This amendment entered Virginia Code section 8.01-380(A).<sup>23</sup>

Virginia Code section 8.01-380 remained unchanged for the next ten years, until a new section 8.01-380(C) was enacted on April 4, 2001 (effective July 1, 2001). It gave the court discretion to assess against the nonsuiting party reasonable witness fees and travel costs of scheduled expert trial witnesses actually incurred by the opposing party due to the nonsuiting party’s failure to give notice of a nonsuit of right at least five days prior to trial.<sup>24</sup>

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17. *See* REPORT OF THE VIRGINIA CODE COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. Doc. No. 14, at 243 (1977) [hereinafter REPORT OF THE VIRGINIA CODE COMMISSION].

18. *Id.*

19. *Id.* at 243–44.

20. Act of Mar. 25, 1983, ch. 404, 1983 Va. Acts 497, 500 (codified as amended at VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 1983)).

21. Note the slight change in the title from the 1977 version of Virginia Code § 8.01-380 (removal of the word “an”).

22. Act of Feb. 20, 1991, ch. 19, 1991 Va. Acts 31, 31 (codified as amended at VA. CODE ANN. § 8.01-380 (Cum Supp. 1991)).

23. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 1991)).

24. Act of Apr. 4, 2001, ch. 825, 2001 Va. Acts 1149, 1149 (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2001)).

Former section 8.01-380(C) was redesignated as section 8.01-380(D).<sup>25</sup>

Earlier efforts to amend section 8.01-380 in 1995, 1996, 1997, and 2000 were unsuccessful.<sup>26</sup> Another unsuccessful effort to amend section 8.01-380 occurred in 2002.<sup>27</sup> In the 2004 session of the General Assembly, there were two unsuccessful efforts to amend section 8.01-380, one of which was carried over to the 2005 session where it was also unsuccessful.<sup>28</sup> But a third bill, H.B.

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25. See *id.* (codified as amended at VA. CODE ANN. § 8.01-380(D) (Cum. Supp. 2001)). This amendment resulted from the 2001 passage of H.B. 2722, introduced by Delegate V. Earl Dickinson (R-Mineral). *Id.*

26. In 1995, S.B. 770, introduced by Senator Joseph B. Benedetti (R-Richmond), would have permitted the court to assess costs and reasonable attorney's fees against the nonsuiting party if a nonsuit were taken at any time after the plaintiff rested its case in chief. S.B. 770, Va. Gen. Assembly (Reg. Sess. 1995). In 1996, there were three nonsuit bills: H.B. 1221, introduced by Delegate William J. Howell (R-Stafford), would have specified that a party could nonsuit only within one year of the commencement of the action if no process had been served; H.B. 876, introduced by Delegate V. Earl Dickinson (D-Mineral), would have required a nonsuit be taken at least 30 days prior to trial, permitted the assessment of reasonable attorney's fees and costs against any nonsuiting party, and required such assessment if the nonsuiting party did not prevail when an additional nonsuit was allowed; and H.B. 1323, introduced by then Delegate Eric I. Cantor (R-Richmond), would have required the assessment of reasonable attorney's fees and costs against the nonsuiting party if a nonsuit were taken at any time after the plaintiff rested its case in chief, or if a second or other additional nonsuit were allowed. H.B. 1221, Va. Gen. Assembly (Reg. Sess. 1996); H.B. 876, Va. Gen. Assembly (Reg. Sess. 1996); H.B. 1323, Va. Gen. Assembly (Reg. Sess. 1996). In 1997, H.B. 2582, introduced by Delegate V. Earl Dickinson, was identical to his H.B. 876, introduced in the 1996 session. Compare H.B. 2582, Va. Gen. Assembly (Reg. Sess. 1997), with H.B. 876, Va. Gen. Assembly (Reg. Sess. 1996). In 2000, H.B. 844, introduced by Delegate William J. Howell (R-Fredericksburg), would have required the assessment of reasonable attorney's fees and costs against the nonsuiting party whenever a nonsuit was taken within fifteen days prior to trial. H.B. 844, Va. Gen. Assembly (Reg. Sess. 2000).

27. S.B. 558, introduced by Senator Walter A. Stosch (R-Henrico), would have permitted the assessment against the nonsuiting party of any costs actually incurred in summoning or impaneling jurors for trial if a nonsuit of right was taken at trial, or within 24 hours prior to the beginning of trial. S.B. 558, Va. Gen. Assembly (Reg. Sess. 2002). S.B. 558 was reportedly introduced at the behest of Richmond area judges who asserted that last-minute nonsuits were costing the Richmond Circuit Court "a couple of thousand dollars a month" in jury costs. E-mail from VTLA to General Members (Jan. 28, 2002) (on file with author).

28. S.B. 141, introduced by then Senator Ken T. Cuccinelli, II (R-Fairfax), would have required a nonsuit to be taken on or before fourteen days prior to the trial date. S.B. 141, Va. Gen. Assembly (Reg. Sess. 2004). On February 11, 2004, it was continued to 2005 in Courts of Justice. *S.B. 141, Trials; Dismissal of action by nonsuit*, VA. LEGIS. INFO. SYS. (Jan. 14, 2004), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=051+typ=bil+val=SB141>. During the 2005 session of the General Assembly, S.B. 141 was left in Courts of Justice on December 13, 2004. *Id.* H.B. 896, introduced by Delegate Robert B. Bell (R-Charlottesville), would have required the court to dismiss a case with prejudice if the plaintiff suffered a nonsuit fewer than twenty-one days before trial, unless the plaintiff showed good cause for the late notice, or agreed to pay the defendant's costs of preparing

624, successfully amended section 8.01-380(C) to extend the period before trial within which a nonsuiting party's failure to give notice to the opposing party would trigger the court's discretion to assess against the nonsuiting party reasonable witness fees and travel costs of scheduled expert witnesses.<sup>29</sup>

In 2003, some members of the Boyd-Graves Committee on "Time Limit on Taking Nonsuit If No Service" began drafting potential amendments to Virginia Code sections 8.01-3.80 and 8.01-229 which would have essentially put a time limit on how long a case could sit before the right to nonsuit expired.<sup>30</sup> The members ultimately made no recommendation to the Boyd-Graves Committee on this issue because the plaintiffs' bar and the defense bar could not agree on a proposal.<sup>31</sup>

During the 2005 General Assembly, Delegate Robert D. Orrock Sr. (R-Thornburg) introduced H.B. 1649, which, if enacted in its original form, would have provided, in an amended section 15.2-4905(B), that if an industrial development authority instituted a civil suit challenging a contract between the authority and a private landowner, and the authority withdrew the suit for any reason including a nonsuit pursuant to section 8.01-380, the court would be required to order the authority to pay the reasonable attorney's fees and other costs incurred by the landowner as a result of the suit.<sup>32</sup> As finally enacted, H.B. 1649 did not include the proposed section 15.2-4905(B).<sup>33</sup>

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for trial, to a limit of \$1,000 in general district court and \$25,000 in circuit court (reasonable costs would have included expert witness fees, court reporter appearance fees, transcript fees, travel expenses for attorneys and for fact and expert witnesses, service of process fees, filing fees, and cancellation fees charged by expert witnesses). H.B. 896, Va. Gen. Assembly (Reg. Sess. 2004).

29. The 2004 amendment to section 8.01-380(C) resulted from the passage of H.B. 624, introduced by Delegate John M. O'Bannon II (R-Henrico), which was originally applicable only to medical malpractice actions. H.B. 624, Va. Gen. Assembly (Reg. Sess. Jan. 14, 2004). The House amended Delegate O'Bannon's original bill, and the Senate, in turn, amended the House's version. H.B. 624, Va. Gen. Assembly (Reg. Sess. Feb. 13, 2004); H.B. 624, Va. Gen. Assembly (Reg. Sess. Mar. 8, 2004). The House then agreed to the Senate's amendment. Act of Apr. 8, 2004, ch. 362, 2004 Va. Acts 495, 495 (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2004)).

30. On file with author.

31. On file with author.

32. H.B. 1649, Va. Gen. Assembly (Reg. Sess. 2005).

33. Act of Mar. 22, 2005, ch. 575, 2005 Va. Acts, 763, 764 (codified as amended at VA. CODE ANN. § 15.2-4905 (Cum. Supp. 2005)).

During the 2006 General Assembly, two bills were introduced which addressed nonsuit in civil cases. Delegate Michele B. McQuigg (R-Occoquan) introduced H.B. 719, which, had it been enacted, would have amended section 8.01-380(B) to require that, in the event additional nonsuits were allowed, all parties receive proper notice prior to any such nonsuit being granted.<sup>34</sup> H.B. 719 was assigned to the Court of Justice Civil Law Subcommittee and was left in Courts of Justice on February 15, 2006.<sup>35</sup> The second bill, H.B. 1424, was introduced by Delegate Salvatore R. Iaquinto (R-Virginia Beach).<sup>36</sup> It was passed by the House and Senate, and signed by the governor.<sup>37</sup> H.B. 1424 amended and reenacted Virginia Code section 8.01-277, and provided that a defendant who has not been served within one year of the filing of a suit may make a special appearance, which does not constitute a general appearance, to file a motion to dismiss.<sup>38</sup> Additionally, except in cases involving asbestos, upon finding that the plaintiff did not exercise due diligence to have timely service, and after sustaining the motion to dismiss, it provided that the court is required to dismiss the action with prejudice.<sup>39</sup> It further provided that if the court finds the plaintiff exercised due diligence to have timely service, and denies the motion to dismiss, the court must require the movant to file a responsive pleading within twenty-one days of such ruling.<sup>40</sup> However, nothing in the amended and reenacted section 8.01-277 prevents the plaintiff from filing a nonsuit under section 8.01-380 before the entry of an order granting a motion to dismiss pursuant to the provisions of section 8.01-277(B).

In 2007, the General Assembly considered four bills addressing nonsuit through proposed amendments to Virginia Code section 8.01-380. H.B. 1735, introduced by Delegate William H. Franlin, Jr. (R-Roanoke), incorporated both H.B. 1902 and H.B. 2495, each introduced by Delegate David B. Albo (R-

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34. H.B. 719, Va. Gen. Assembly (Reg. Sess. 2006).

35. *H.B. 719 Nonsuits; parties to be notified if additional are granted*, VA. LEGIS. INFO. SYS. (Feb. 15, 2006), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb719>.

36. H.B. 1424, Va. Gen. Assembly (Reg. Sess. 2006).

37. Act of Mar. 23, 2006, ch. 151, 2006 Va. Acts 174, 174 (codified as amended as VA. CODE ANN. § 8.01-277 (Repl. Vol. 2007)).

38. *Id.*

39. VA. CODE ANN. § 8.01-277(B) (Repl. Vol. 2007).

40. *Id.*

Fairfax).<sup>41</sup> H.B. 1735 had an identical counterpart in S.B. 911, introduced by Senator Mark D. Obenshain (R-Harrisonburg).<sup>42</sup> H.B. 1735 and S.B. 911 provided that the court's discretion to permit additional nonsuits would be restricted by a requirement for reasonable notice to counsel of record for all defendants, and upon a reasonable attempt to notify any party not represented by counsel.<sup>43</sup> This was an apparent response to the Supreme Court of Virginia's comment in *Janvier v. Arminio* that justice would be best served if such notice were required. However, the Court held that, at that time, section 8.01-380 contained no such notice provision for the taking of an additional nonsuit.<sup>44</sup> These bills also contained a requirement that when suffering a nonsuit, a party must inform the court if the cause of action had been previously nonsuited, and that any order effecting a subsequent nonsuit would have to reflect all prior nonsuits, including the date thereof, as well as the court in which any such prior nonsuit was taken.<sup>45</sup> H.B. 1735 and S.B. 911 were enacted into law, effective July 1, 2007, amending section 8.01-380(B).<sup>46</sup>

The 2007 General Assembly also considered three other bills addressing nonsuit, albeit not directly proposing amendment to Virginia Code section 8.01-380. H.B. 2521, introduced by Delegate Salvatore R. Iaquinto (R-Virginia Beach), proposed an amendment to Virginia Code section 8.01-335(D), providing that, while a court might in its discretion dismiss an action with prejudice if process is not served within one year, the plaintiff would not be prevented from nonsuiting the action.<sup>47</sup> H.B. 2566, introduced by Delegate Stephen C. Shannon (D-Vienna), which incorporated H.B. 2074, introduced by Delegate Ward L. Armstrong (D-Martinsville), proposed an amendment to section 16.1-298(D), addressing the resolution of an appeal from general district court

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41. H.B. 1735, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 1902, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2495, Va. Gen. Assembly (Reg. Sess. 2007).

42. Compare H.B. 1735, with S.B. 911, Va. Gen. Assembly (Reg. Sess. 2007).

43. H.B. 1735; S.B. 911.

44. *Janvier v. Arminio*, 272 Va. 353, 367, 634 S.E.2d 754, 761 (2006).

45. H.B. 1902; H.B. 2495; H.B. 1735; S.B. 911.

46. Act of Mar. 9, 2007, ch. 179, 2007 Va. Acts 259, 259 (codified as amended at VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007)); Act of Mar. 15, 2007, ch. 367, 2007 Va. Acts 510, 510 (codified as amended at VA. CODE ANN. § 8.01-380(B) (Repl. Vol. 2007)).

47. H.B. 2521, Va. Gen. Assembly (Reg. Sess. 2007).

by the circuit court, without the latter reaching a judgment on the merits of the underlying petition other than by nonsuit.<sup>48</sup>

Between the 2007 session and the 2013 session of the General Assembly, there were no legislative proposals to substantively amend section 8.01-380. That inactivity came to an end in 2013. The Virginia Chamber of Commerce, in its *2013 Legislative Priorities*, supported nonsuit reform and legislative proposals to amend section 8.01-380.<sup>49</sup> Four bills were introduced in the 2013 Virginia General Assembly to amend section 8.01-380: S.B. 903, introduced by Senator Bryce E. Reeves (R-Fredericksburg); H.B. 1570, introduced by Delegate J. Randall Minchew (R-Leesburg); H.B. 1709, introduced by Delegate Gregory D. Habeeb (R-Salem); and H.B. 1773, introduced by Delegate David B. Albo (R-Springfield).<sup>50</sup> All four of these bills before the 2013 General Assembly proposed to amend section 8.01-380(B) by substituting “attorney” for “attorneys” after “reasonable” and before “fees against the nonsuiting party.”<sup>51</sup>

S.B. 903, H.B. 1570, and H.B. 1709 proposed to extend the seven days prior to trial notice provision of section 8.01-380(C) to a notice of nonsuit of right during trial, and to also provide that:

Invoices, receipts, or confirmation of payment shall be admissible to prove reasonableness without the need to offer testimony to support the authenticity or reasonableness of such documents, and may, in the court’s discretion, satisfy the reasonableness requirement under this subsection. Nothing herein shall preclude any party from offering additional evidence or testimony to support or rebut the reasonableness requirement.<sup>52</sup>

H.B. 1773 also proposed to extend section 8.01-380(C) to a notice of nonsuit during trial, but did not include the additional provisions of S.B. 903, H.B. 1570, and H.B. 1709.<sup>53</sup>

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48. H.B. 2566, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2074, Va. Gen. Assembly (Reg. Sess. 2007).

49. VA. CHAMBER OF COMMERCE, 2013 LEGISLATIVE PRIORITIES 3 (2013).

50. S.B. 903, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 14, 2013, ch. 366, 2013 Va. Acts \_\_\_); H.B. 1570, Va. Gen. Assembly (Reg. Sess. 2013) (incorporated into H.B. 1709, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 13, 2013, ch. 274, 2013 Va. Acts \_\_\_)); H.B. 1773, Va. Gen. Assembly (Reg. Sess. 2013).

51. S.B. 903; H.B. 1570; H.B. 1709; H.B. 1773.

52. S.B. 903; H.B. 1570; H.B. 1709.

53. H.B. 1773; *see* S.B. 903; H.B. 1570; H.B. 1709.

H.B. 1773 also proposed to add a new section 8.01-380(E), as follows:

E. If a nonsuit is taken within 14 days prior to trial or during trial and a new proceeding on the same cause of action is instituted in any court by the plaintiff in the prior nonsuited action, the court may, upon motion of the defendant, award reasonable attorney fees, expenses, and costs to any defendant who was also a defendant in the prior nonsuited action. A motion pursuant to this subsection may be made concurrent with or subsequent to the defendant's answer in the new proceeding. To the extent an award is made pursuant to this subsection, the award shall reasonably compensate the defendant for any fees, expenses, and costs paid or incurred by the defendant for the period between 14 days prior to trial and the time the nonsuit was taken that will be incurred again in the new proceeding, including fees, expenses, and costs related to witness and attorney preparation. An award made pursuant to this subsection shall not exceed \$25,000 or 10 percent of the amount of damages sought by the plaintiff in the new proceeding against the defendant requesting the award, whichever is greater.<sup>54</sup>

Also introduced in the 2013 session of the General Assembly were three bills not directly proposing amendments to section 8.01-380, but which would nevertheless have affected nonsuit practice in Virginia if they had been enacted. They were H.B. 1676, introduced by Delegate Terry G. Kilgore (R-Gate City); H.B. 1754, introduced by Delegate Thomas C. Wright, Jr. (R-Victoria); and S.B. 1278, introduced by Senator Richard H. Stuart (R-Montross).<sup>55</sup>

All three of these bills proposed to amend Virginia Code section 8.01-275.1 (when service of process is timely). H.B. 1676 and S.B. 1278 proposed to reduce the period in which service of process is considered timely to six months from the commencement of the action, down from the current twelve months, while H.B. 1754 proposed to reduce that period to ninety days.<sup>56</sup>

All three of these bills also proposed to amend Virginia Code section 8.01-277 ("Defective process; motion to quash; untimely service; motion to dismiss"), including therein the respective six-month (H.B. 1676 and S.B. 1278)<sup>57</sup> or ninety-day (H.B. 1754)<sup>58</sup> pe-

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54. H.B. 1773.

55. H.B. 1676, Va. Gen. Assembly (Reg. Sess. 2013); H.B. 1754, Va. Gen. Assembly (Reg. Sess. 2013); S.B. 1278, Va. Gen. Assembly (Reg. Sess. 2013).

56. H.B. 1676; H.B. 1754; S.B. 1278.

57. H.B. 1676; S.B. 1278.

riod after which, without service of process and in the absence of a plaintiff's due diligence, the court shall dismiss the action with prejudice. The nonsuit provision of current section 8.01-277, which permits a nonsuit before the entry of an order granting a motion to dismiss thereunder, would have been amended by all three bills to read as follows:

Nothing herein shall prevent the plaintiff from filing a nonsuit under § 8.01-380 within [six months—H.B. 1676 and S.B. 1278] [90 days—H.B. 1754] of the commencement of the action provided that in the absence of timely service, no nonsuit may be taken more than (six months—H.B. 1676 and S.B. 1278) [90 days—H.B. 1754] after the commencement of the action except upon a finding that the plaintiff did exercise due diligence to have timely service.<sup>59</sup>

Only two of the seven bills introduced during the 2013 General Assembly survived the legislative process. H.B. 1570 was incorporated into H.B. 1709.<sup>60</sup> H.B. 1676, H.B. 1754, and H.B. 1773 were left in Courts of Justice,<sup>61</sup> and S.B. 1278 was stricken at the request of its patron.<sup>62</sup> The 2013 amendments to sections 8.01-380 (B) and (C) were H.B. 1709, enacted as Acts of Assembly, Chapter 274, effective July 1, 2013, and its Senate identical twin, S.B. 903 enacted as Acts of Assembly, Chapter 366, effective July 1, 2013.<sup>63</sup>

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58. H.B. 1754.

59. H.B. 1676; H.B. 1754; S.B. 1278.

60. See *H.B. 1570 Nonsuits; dismissal of action, fees and costs*, VA. LEGIS. INFO. SYS. (Jan. 28, 2013), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb1570>.

61. See *H.B. 1676 Service of Process; in order to be timely, must be made within six months from commencement*, VA. LEGIS. INFO. SYS. (Feb. 5, 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb1676>; *H.B. 1754 Service of Process; in order to be timely, must be made within 90 days from commencement of action*, VA. LEGIS. INFO. SYS. (Feb. 5, 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb1754>; *H.B. 1773 Nonsuits; fees and costs*, VA. LEGIS. INFO. SYS. (Feb. 5, 2013), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb1773>.

62. See *S.B. 1278 Services of Process, in order to be timely must be made six months from commencement*, VA. LEGIS. INFO. SYS. (Feb. 1, 2013), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=sb1278>.

63. H.B. 1709, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 13, 2013, ch. 274, 2013 Va. Acts \_\_\_); S.B. 903, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 14, 2013, ch. 366, 2013 Va. Acts \_\_\_). H.B. 1709 and S.B. 903 were part of a so-called "Tort Reform Package" in the 2013 General Assembly session, supported by a coalition which included the Medical Society of Virginia, the Virginia Chamber of Commerce, the Virginia Trial Lawyers Association, and the Virginia Alliance for Tort Reform. See Peter Vieth, *Tort Reform deal launched in House*, VA. LAW. WKLY. (Jan. 24, 2013), <http://va.lawyersweekly.com/2013/01/24/tort-reform-deal-leaves-both-sides-claiming-Progress>. That package included six other legislative proposals, all of which were enacted. See H.B. 1433, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 20, 2013, ch. 551, 2013 Va. Acts \_\_\_); H.B. 1477, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 5, 2013, ch. 61, 2013 Va. Acts \_\_\_); H.B. 1545, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act

An analysis of these amendments is provided elsewhere in this article.<sup>64</sup>

### III. NONSUIT ORIGINALLY INCLUDED COMMON LAW PRINCIPLES OF PREJUDICE TO THE DEFENDANT

Despite the existence of a nonsuit statute in Virginia for some two hundred and seven years, common law principles were still relevant in determining the extent of a Virginia plaintiff's right to obtain nonsuit until 1996.<sup>65</sup> The co-existence of statutory and common law principles was in accord with settled Virginia law providing that statutes presumptively do not change the common law unless expressly stating otherwise.<sup>66</sup>

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of Mar. 5, 2013, ch. 65, 2013 Va. Acts \_\_\_); H.B. 1708, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 5, 2013, ch. 76, 2013 Va. Acts \_\_\_); H.B. 1618, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 5, 2013, ch. 71, 2013 Va. Acts \_\_\_); H.B. 2004, Va. Gen. Assembly (Reg. Sess. 2013) (enacted as Act of Mar. 12, 2013, ch. 217, 2013 Va. Acts \_\_\_). Of the most potential interest to Virginia civil litigators is H.B. 1708, which partially loosens the prior restrictions on the use of discovery depositions and other matters in support of motions for summary judgment. *See* H.B. 1708.

64. *See infra* Parts V.B. & V.C.

65. In January 1996, the Supreme Court of Virginia announced the demise of the common law considerations of prejudice in nonsuit. *Bremer v. Doctor's Bldg. P'ship*, 251 Va. 74, 81, 465 S.E.2d 787, 791 (1996); *see* *Timms v. Rosenblum*, 713 F. Supp. 948, 951 n.3 (E.D. Va. 1989) ("There also exists a judicially created nonsuit limitation . . . that bans a nonsuit if a party is thereby deprived of a right or a defense."); MARTIN P. BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 336 (4th ed. 1952) (recognizing the extra-statutory bar to nonsuit when the dismissal will prejudice or oppress the defendant or deprive him of a just defense or substantive right not available in a second action); *Sweeney, supra* note 7, at 756 ("Although nonsuit in Virginia is primarily regulated by statute, it appears that Virginia has retained the common-law rule that nonsuit may not be taken where it will prejudice the rights of the defendant."); *Tucker, supra* note 1, at 359, 362 (noting that the voluntary nonsuit in Virginia is a creature of case precedent as well as statutory command). Before 1996, the Supreme Court of Virginia recognized the existence of extra-statutory common law principles barring nonsuit. *See* *City of Norfolk v. Cnty. of Norfolk*, 194 Va. 716, 724–25, 75 S.E.2d 66, 70–71 (1953); *Thomas Gemmill, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 98, 184 S.E. 457, 458 (1936); *Bd. of Supervisors v. Proffit*, 129 Va. 9, 17–18, 105 S.E. 666, 668 (1921); *Harrison v. Clemens*, 112 Va. 371, 374, 71 S.E. 538, 539 (1911); *Kemper v. Calhoun*, 111 Va. 428, 431, 69 S.E. 358, 359 (1910); *cf.* *Patterson v. Old Dominion Trust Co.*, 139 Va. 246, 255–56, 123 S.E. 549, 551–52 (1924); *Commonwealth v. Staunton Mut. Tel. Co.*, 134 Va. 291, 298, 114 S.E. 600, 602 (1922).

66. *See* *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) ("[A] statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended."); *Hannabass v. Ryan*, 164 Va. 519, 525, 180 S.E. 416, 418 (1935) ("[T]he common law is not to be considered as altered or changed by statute unless the legislative intent be plainly manifested."); *see also* *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192, 1194–95 (4th Cir. 1985) (stating that even a statute in derogation of the common law does not abolish extra-

Those extra-statutory principles denied nonsuit to a plaintiff if the defendant was prejudiced,<sup>67</sup> but surprisingly, neither the General Assembly nor the Supreme Court of Virginia ever provided any definitive guidance as to the scope and nature of that prejudice.<sup>68</sup>

The Supreme Court of Virginia did, however, describe what would *not* constitute such prejudice. In *Harrison v. Clemens*, the Court observed that prejudice did not include the mere prospect of future litigation rendered possible by the plaintiff's discontinuance of his case.<sup>69</sup> Rejecting the prospect of future litigation, the defendant's loss of time, and expenses incurred in preparation for trial as bars to nonsuit found support in the reasoning of *Kemper v. Calhoun*, which argued that, in the eyes of the law, the ordinary inconvenience of double litigation could be compensated by costs.<sup>70</sup> However, as discussed subsequently, Virginia Code section 8.01-380(B), while authorizing the assessment of costs and reasonable attorney's fees for additional nonsuits, currently precludes such assessment for an initial nonsuit,<sup>71</sup> and section 8.01-380(C) merely permits the discretionary assessment of reasonable expert witness travel expenses and fees actually incurred only when the party employing the witness is not timely given the prescribed notice of the opponent's intention to take a nonsuit of right.<sup>72</sup>

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statutory common law requirements); *State v. Collins*, 329 S.E.2d 839, 842 (W. Va. 1984) (“[A] statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law.”).

67. See *supra* note 7. Each of the authorities cited therein recognized prejudice to the defendant as a bar to a plaintiff's nonsuit. *Accord* 27 C.J.S. *Dismissal and Nonsuit* §§ 7, 26 (1959).

68. See *Sweeney*, *supra* note 7, at 756 (noting that the limitation on the right to nonsuit, when it will prejudice the rights of the defendant, “is not clearly defined”).

69. 112 Va. at 374–75, 71 S.E. at 539; see also *Trout v. Commonwealth Transp. Comm'r of Va.*, 241 Va. 69, 73, 400 S.E.2d 172, 174 (1991) (rejecting the opponent's loss of time and expense incurred in preparation of the case for trial, and any disruption of the court's docket, as bars to nonsuit on the eve of trial).

70. 111 Va. at 430–31, 69 S.E. at 359; see also *Moore v. Moore*, 218 Va. 790, 794, 240 S.E.2d 535, 537–38 (1978).

71. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013). This conclusion is compelled by the doctrine of *expressio unius est exclusio alterius*. *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). Moreover, the Supreme Court of Virginia has limited the trial court's authority to assess costs and reasonable attorney's fees under section 8.01-380(B). See *Albright v. Burke & Herbert Bank & Trust Co.*, 249 Va. 463, 467–68, 457 S.E.2d 776, 778–79 (1995).

72. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

In 1952, one of Virginia's most respected commentators summarized the degree of extra-statutory prejudice required to bar nonsuit as that which would prejudice or oppress the defendant, or deprive him of any just defense or substantive right not available in a second action.<sup>73</sup> Prior to 1996, Virginia case law semantically stated this prejudice as follows: a plaintiff was permitted to "dismiss any claim' where such dismissal will not prejudicially affect the interests of the defendant."<sup>74</sup> However, a plaintiff was not permitted to dismiss or nonsuit "when by so doing he [would] obtain an advantage, and the defendant [would] be prejudiced or oppressed, or deprived of any just defense."<sup>75</sup> Such prejudice or oppression to the defendant was required to "be of a character that deprives him of some substantive right concerning his defenses, not available in a second suit, or that may be endangered by the dismissal,"<sup>76</sup> or an injury of a character that "adversely affected" some substantial right concerning his defense.<sup>77</sup> A plaintiff was not permitted to dismiss his bill in chancery "where in the progress of the case rights have been manifested which the defendant is entitled to claim,"<sup>78</sup> and the dismissal must not have "deprived" the defendant "of any just defense or substantive right."<sup>79</sup> Nonsuit was required to have been taken "before the rights of other parties have attached or their substantive rights have been affected."<sup>80</sup> However, in order to authorize a denial of a nonsuit, there must have been "some plain legal prejudice" beyond the "mere prospect of future litigation," or that "the rights of the defendant would be necessarily prejudiced by dismissal of the action."<sup>81</sup>

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73. BURKS, *supra* note 65, at § 336; *see also* Sweeney, *supra* note 7, at 756 ("Virginia has retained the common-law rule that nonsuit may not be taken where it will prejudice the rights of the defendant.")

74. *Kemper*, 111 Va. at 431, 69 S.E. at 359.

75. *Id.*

76. *Id.*

77. *Moore v. Moore*, 218 Va. 791, 794, 240 S.E.2d 535, 537 (1978).

78. *Commonwealth v. Staunton Mut. Tel. Co.*, 134 Va. 291, 298, 114 S.E. 600, 602 (1922).

79. *Bd. of Supervisors v. Proffit*, 129 Va. 9, 15, 105 S.E. 666, 668 (1921).

80. *City of Norfolk v. Cnty. of Norfolk*, 194 Va. 716, 720–21, 75 S.E.2d 66, 68–69 (1953).

81. *Harrison v. Clemens*, 112 Va. 371, 374, 71 S.E. 538, 539 (1911) (citing *Pullman's Palace Car Co. v. Cent. Transp. Co.*, 171 U.S. 138, 146 (1898)); *see also* *Timms v. Rosenblum*, 713 F. Supp. 948, 951 n.3 (E.D. Va. 1989) (interpreting Virginia law to the effect that nonsuit was barred "if a party [was] thereby deprived of a right or a defense"). *Pull-*

While the Supreme Court of Virginia never decided a case in which it found such prejudice to exist,<sup>82</sup> courts of other jurisdictions have, including federal courts prior to the adoption of the Federal Rules of Civil Procedure in 1938.<sup>83</sup> A detailed discussion of these decisions, however, is beyond the scope of this article.<sup>84</sup>

#### IV. THE DEMISE OF COMMON LAW PRINCIPLES FORMERLY APPLICABLE TO NONSUIT

With its January 1996 decision in *Bremer v. Doctor's Building Partnership*, the Supreme Court of Virginia announced the demise of the common law principles formerly applicable to nonsuit in civil trials.<sup>85</sup> *Bremer* acknowledged the common law principles articulated in prior decisions, such as *Kemper v. Calhoun*, which denied a plaintiff nonsuit if the rights of the defendant were prejudiced by the dismissal of the action,<sup>86</sup> and characterized this prejudice as “the inability of the defendant to pursue his claims

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*man's Palace Car Co.* authorized a court to deny motions to discontinue if the defendant had acquired some rights which might be “lost or rendered less efficient by the discontinuance.” *Pullman's Palace Car Co. v. Cent. Transp. Co.*, 171 U.S. 138, 146.

82. See generally *City of Norfolk*, 194 Va. at 724–26, 75 S.E.2d at 71–72; *Harrison*, 112 Va. at 374–75, 71 S.E. at 539.

83. 9 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2363 (2d ed. 1995). Under the Conformity Act, in effect prior to the 1938 adoption of the Federal Rules of Civil Procedure, federal courts were required to apply state procedure regarding nonsuit or voluntary dismissals in all actions at law. *Id.* In equity, the plaintiff had a qualified right to dismiss at any time before an interlocutory or final decree, unless the defendant would be prejudiced beyond the threat of another suit. *Id.* Accordingly, federal cases prior to 1938, unencumbered by Federal Rule of Civil Procedure 41, are instructive in evaluating the scope and nature of the extra-statutory prejudice which would bar nonsuit. See *infra* note 84.

84. See, e.g., *Clifton v. Tomb*, 21 F.2d 893, 896–97 (4th Cir. 1927); *Callahan v. Hicks*, 90 F. 539, 543 (W.D. Va. 1898); *Hershberger v. Blewett*, 55 F. 170, 170–71, 181 (N.D. Wash. 1892); *Pullman's Palace-Car Co. v. Cent. Transp. Co.*, 49 F. 261, 262–63 (E.D. Pa. 1891); *Holcomb v. Holcomb*, 23 F. 781, 782 (E.D. Mich. 1885); *Stevens v. The Railroads*, 4 F. 97, 100, 104–05 (W.D. Tenn. 1880), *aff'd sub nom.* *The Tennessee Bond Cases*, 114 U.S. 663 (1885); *Muller v. Maxcy*, 74 So. 2d 879, 881–82 (Fla. 1954); *Nystrom v. Nystrom*, 105 So. 2d 605, 609 (Fla. Dist. Ct. App. 1958); *State v. Hemingway*, 10 So. 575, 576–77 (Miss. 1891); *Ex parte Welsh*, 116 A. 23, 25 (N.J. Ch. 1922); *Young v. Vail*, 222 P. 912, 928–29 (N.M. 1924); *Thomas v. Donitz*, 251 N.Y.S. 2d 177, 178–80 (N.Y. Sup. Ct. Spec. Sess. 1964); *Newman v. Old West, Inc.*, 334 S.E.2d 275, 276–77 (S.C. 1985); *Crout v. S.C. Nat'l Bank*, 293 S.E.2d 422, 423–24 (S.C. 1982); *Wildhagen v. Ayers*, 82 S.E.2d 609, 610–11 (S.C. 1954); *Subera v. Jones*, 108 N.W. 26, 27 (S.D. 1906).

85. 251 Va. 74, 80–81, 465 S.E.2d 787, 791 (1996). The author of this article argued *Bremer* before the supreme court for the unsuccessful appellants.

86. 111 Va. 428, 430–31, 69 S.E. 358, 359 (1910).

against the plaintiff.”<sup>87</sup> *Bremer* then sealed the demise of these common law principles:

[T]he common law considerations of prejudice were codified in Code § 8.01-380(C) by prohibiting a nonsuit if a pending counterclaim, cross claim, or third-party claim could not be *independently* adjudicated. Therefore, a plaintiff is entitled to one nonsuit as a matter of right if the provisions of Code § 8.01-380 are met without further analysis of prejudice to the defendant.<sup>88</sup>

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87. *Bremer*, 251 Va. at 80, 465 S.E.2d at 791. While *Bremer* did not state the basis for this conclusion, that basis may be the court’s prior decisions in which the existence of the defendant’s recoupment claim, set-off, or claim for affirmative relief was sufficient to deny the plaintiff a contested nonsuit. *See, e.g.*, *Thomas Gemmill Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 101, 184 S.E. 457, 459 (1936) (quoting *Garfield v. Mansfield Steel Corp.*, 194 N.W. 526, 527 (Mich. 1926)); *Jenkins v. Faulkner*, 174 Va. 43, 44, 4 S.E.2d 788, 789 (1939) (quoting *Molen v. Denning & Clark Livestock Co.*, 50 P.2d 9, 10 (Idaho 1935)). However, as *Bremer* held, recoupment is no bar to nonsuit, whether or not it can remain for independent adjudication. *Bremer*, 251 Va. at 81, 465 S.E.2d at 791. The continued validity of that portion of *Bremer* addressing recoupment is unclear. The Supreme Court of Virginia has promulgated current Rule 3:9, complementing 2005 S.B. 1118 (which required a single form of civil action). *Compare* VA. SUP. CT. R.3:9 (Repl. Vol. 2013), with Act of Mar. 23, 2005, ch. 681, 2005 Va. Acts 957, 958 (codified as amended at VA. CODE ANN. § 8.01-272 (Cum. Supp. 2005)). Accordingly, that portion of *Bremer* which was predicated upon the conclusion that counterclaims in Virginia are limited to actions at law is no longer correct. Current Rule 3:9(a) includes within counterclaims “*any cause of action* that the defendant has against the plaintiff or all plaintiffs jointly . . .” VA. SUP. CT. R. 3:9(a) (Repl. Vol. 2013) (emphasis added). Under current Rule 3:1, a civil action now includes both legal and equitable causes of action. VA. SUP. CT. R. 3:1 (Repl. Vol. 2013). It will, therefore, be interesting to see if the Supreme Court of Virginia will conclude that matters entitling a defendant to relief in equity under Virginia Code section 8.01-422 (which was not modified by 2005 S.B. 1118) now fall within the scope of counterclaims under current Rule 3:9.

88. *Bremer*, 251 Va. at 81, 465 S.E.2d at 791 (former Virginia Code section 8.01-380(C), quoted in *Bremer*, is now section 8.01-380(D)). The quoted portion of *Bremer* is, however, puzzling in two respects.

First, as *Bremer* noted, “[i]n the 1977 recodification of Title 8, the Code sections dealing with nonsuits were consolidated in Code § 8.01-380 of new Title 8.01.” *Bremer*, 251 Va. at 76, 456 S.E.2d at 788 (citing REPORT OF THE VIRGINIA CODE COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. Doc. No. 14, at 243 (1977)). The common law considerations of prejudice which *Bremer* held to have been codified in former section 8.01-380(C) are not, however, discussed at any place in the extensive Reviser’s Note to code section 8.01-380. *See* REPORT OF THE VIRGINIA CODE COMMISSION, *supra* note 17, at 243–44. Moreover, the Reviser’s Note specifically discussed *Tucker*, *supra* note 1, and *Sweeney*, *supra* note 7, but only in connection with *Berryman v. Moody*, 205 Va. 516, 137 S.E.2d 900 (1964), regarding *the time* when a party may nonsuit. There was no discussion of or rejection by the Revisers of the views of *Tucker* and *Sweeney* that recognized the co-existence of *both* common law and statutory principles as governing nonsuit in Virginia. *Tucker*, *supra* note 1, at 362; *Sweeney*, *supra* note 7, at 756. Further, in 1978, after acknowledging the enactment of section 8.01-380, effective October 1, 1977, the court, in *Moore v. Moore*, 218 Va. 790, 794, 240 S.E.2d 535, 537–38 (1978), discussed the common law prejudice aspects of *Kemper*, 111 Va. at 431, 69 S.E. at 359, in the context of an apparent recognition of their continued existence. *See also* *Trout v. Commonwealth Transp.*

In addition to its puzzling aspects, discussed in note 88, and the effect of current Supreme Court of Virginia Rule 3:9, *Bremer* leaves a number of unanswered questions, including the current status of such previously recognized extra-statutory bars to nonsuit, such as the “good faith” requirement of *Board of Supervisors v. Proffit*;<sup>89</sup> the prohibition against unilateral nonsuit by a plaintiff who acts in a fiduciary capacity;<sup>90</sup> the objection to nonsuit in an annexation case by a nominal defendant whose true posture is that of a party plaintiff;<sup>91</sup> and cases in which there are public interests involved.<sup>92</sup> None of these extra-statutory bars to nonsuit was directly predicated upon the common law considerations of prejudice to the defendant, which *Bremer* found to be codified in former section 8.01-380(C).<sup>93</sup> On the other hand, *Bremer* can be read as excluding all bars to nonsuit except those expressly contained in section 8.01-380.<sup>94</sup> The question awaits resolution from the Supreme Court of Virginia.

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Comm'r, 241 Va. 69, 73, 400 S.E.2d 172, 174 (1991) (discussing the kinds of prejudice to a defendant which would involve section 8.01-380(C)). Moreover, in 1989, the District Court for the Eastern District of Virginia interpreted Virginia law as still barring nonsuit “if a party is thereby deprived of a right or a defense.” *Timms v. Rosenblum*, 713 F. Supp. 948, 951 n.3 (E.D. Va. 1989). Accordingly, there appears to be some tension between *Bremer*’s holding that all the common law considerations of prejudice were codified in former section 8.01-380(C), and *Boyd v. Commonwealth*, 246 Va. 346, 349, 374 S.E.2d 301, 302 (1988) (holding that the common law is not considered, altered or changed by statute unless the legislative intent is plainly manifested, and the common law is abrogated only to the extent statutory terms are directly and irreconcilably opposed).

Second, *Bremer*’s conclusion that a plaintiff is entitled to one nonsuit as a matter of right if the provisions of section 8.01-380 are met, without further analysis of prejudice to the defendant is apparently predicated upon three prior decisions of the court cited therein. *See Gilbreath v. Brewster*, 250 Va. 436, 463 S.E.2d 836 (1995); *Clark v. Butler Aviation Wash. Nat’l, Inc.*, 238 Va. 506, 385 S.E.2d 847 (1989); *Nash v. Jewell*, 227 Va. 230, 315 S.E.2d 825 (1989). Each of these three decisions recognized a plaintiff’s statutory right to nonsuit but none expressed the premise for which they are cited in *Bremer*. *Gilbreath*, 250 Va. at 438–39, 463 S.E.2d at 838; *Clark*, 238 Va. at 508–09, 385 S.E.2d at 849; *Nash*, 227 Va. at 237, 315 S.E.2d at 829. If the court intended to express that premise in *Gilbreath*, *Clark*, and *Nash*, the message was unclear.

89. 129 Va. 9, 14, 105 S.E. 666, 667 (1921).

90. *See Patterson v. Old Dominion Trust Co.*, 139 Va. 246, 258, 123 S.E. 549, 552 (1924).

91. *See City of Roanoke v. Cnty. of Roanoke*, 214 Va. 216, 230, 198 S.E.2d 780, 790 (1973).

92. *See Commonwealth v. Staunton Mut. Tel. Co.*, 134 Va. 291, 299, 114 S.E. 600, 602 (1922); *see also Bowen & Smoot v. Plumlee*, 391 S.E.2d 558, 560 (S.C. 1990); *Thomas v. Donitz*, 251 N.Y.S.2d 177, 179 (N.Y. Sup. Ct. Sess. 1964).

93. 251 Va. at 81, 465 S.E.2d at 791.

94. *See VA. CODE ANN. § 8.01-380* (Cum. Supp. 2013).

## V. STATUTORY PRINCIPLES GOVERNING NONSUIT IN VIRGINIA

Arguably, under *Harrison v. Clemens*, the Virginia nonsuit statute modifies the common law right to nonsuit only after certain *stages* in the proceedings.<sup>95</sup> However, the better view appears to be that, while originally controlled by the common law, nonsuit in Virginia is now governed by statute: namely Virginia Code section 8.01-380.<sup>96</sup> Accordingly, a trial court is not permitted to circumscribe that statutory right by judicial fiat.

The Supreme Court of Virginia has continued to emphasize that “with respect to a *first* nonsuit a trial court may not place limitations on the absolute right of a plaintiff to seek the nonsuit beyond those found in the statute.”<sup>97</sup> The court in *Martin v. Duncan* reversed the trial court’s imposition of jury costs on a litigant taking a first nonsuit which had been impermissibly required by a local rule.<sup>98</sup>

In *McManama v. Plunk*, the Supreme Court of Virginia found that the trial court erred when it placed limitations on “a party’s *statutory right* to one voluntary nonsuit, as authorized by section 8.01-380(B),” while ruling that nonsuit could not be granted unless the defendant is first served with process, has entered an appearance, and has notice of the hearing and an opportunity to

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95. *Harrison v. Clemens*, 112 Va. 371, 373, 71 S.E. 538, 538 (1911); *accord* Tucker, *supra* note 1, at 357. Under the early common law, nonsuit occurred when the plaintiff was not in court to answer the demand of the defendant, especially to hear the verdict of the jury, which could not be given without the plaintiff’s presence. Tucker, *supra* note 1, at 357. Nonsuit could be had either before or after jury verdict (the latter when the plaintiff was unhappy with the damages), or prior to announcement of the court’s decision in a bench trial. *Id.* In 1400, the statute of 2 Henry IV, c.7, prohibited nonsuit after verdict. *Id.*; Head, *supra* note 7, at 20–23; Sweeney, *supra* note 7, at 752–53.

96. See *Wilby v. Costel*, 265 Va. 437, 444, 578 S.E.2d 796, 800 (2003) (“Code § 8.01-380 . . . governs the right of a plaintiff to take a voluntary nonsuit . . .”); *Bremer*, 251 Va. at 81, 465 S.E.2d at 791 (stating that common law considerations of prejudice, which could deny a plaintiff entitlement to nonsuit, were codified in section 8.01-380, and “therefore, a plaintiff is entitled to one nonsuit as a matter of right if the provisions of section 8.01-380 are met without further analysis of prejudice to the defendant.”); *Dalloul v. Agbey*, 255 Va. 511, 514, 499 S.E.2d 279, 281 (1998) (“The language of section 8.01-380 allows a plaintiff, among other things, the right to take one nonsuit of any cause of action or claim that has not been struck from the case or submitted to the trier of fact for decision.”).

97. *Martin v. Duncan*, 277 Va. 204, 207, 671 S.E.2d 151, 153 (2009) (citing *Janvier v. Arminio*, 272 Va. 353, 366, 634 S.E.2d 754, 760 (2006)) (emphasis added). With regard to the trial court’s discretion concerning additional nonsuits, see *infra* Part V.B.

98. *Martin*, 277 Va. at 208, 671 S.E.2d at 153.

be heard.<sup>99</sup> The court in *McManama* rejected the unserved defendant's contention that his lack of notice of the nonsuit deprived him of a protected property interest.<sup>100</sup> Inasmuch as no portion of section 8.01-380 barred the plaintiff from nonsuit, and the nonsuit did not deprive the defendant of any valid or vested defense, whether by the statute of limitations, the time limits of former Supreme Court of Virginia Rule 3:3, or otherwise, the defendant had no property interest to protect.<sup>101</sup> Therefore, today's careful litigant can no longer rely upon earlier common law principles pertaining to nonsuit, but must be fully cognizant of the statutory principles which currently govern nonsuit in Virginia, and the Virginia judicial interpretations thereof.

A. *Code Section 8.01-380(A): Application and Timing of A Nonsuit; Venue Issues*

1. Nonsuit is Limited to a Valid and Pending Cause of Action or Claim

A Virginia plaintiff is limited to nonsuiting a cause of action, a claim, or a party.<sup>102</sup> "Party" is easily understood, but "cause of action" and "claim" have received their share of judicial scrutiny. The nonsuit statute authorizes a nonsuit as to a "cause of action" or "claim," but not an "action."<sup>103</sup> "Action" is defined by Virginia Code section 8.01-2 to include "all civil proceedings, whether upon claims at law, in equity, or statutory in nature," in circuit or general district court.<sup>104</sup> Rule 3:1 notes that "action," as used in Part

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99. 250 Va. 27, 29, 32, 458 S.E.2d 759, 760, 762 (1995) (emphasis added).

100. *Id.* at 33, 458 S.E.2d at 762; see *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001).

101. *McManama*, 250 Va. at 34, 458 S.E.2d at 763. The lack of notice of nonsuit is prejudicial error, however, when a cross-claim has been filed in the case, even though the cross-claim is not time-barred and the cross-claimant could conceivably have taken steps to institute a separate suit on his cross-claim after he learned of the nonsuit. *Iloff v. Richards*, 221 Va. 644, 648-49, 272 S.E.2d 645, 648 (1980).

102. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2013); see *Delaney v. Marsh*, No. 7:8-ev-00465, 2010 U.S. Dist. LEXIS 28229, at \*19 (W.D. Va., Mar. 25, 2010) (citing *Payne v. Buena Vista Extract Co.*, 124 Va. 296, 313, 98 S.E. 34, 40 (1919)).

103. VA. CODE ANN. § 8.01-380(A).

104. *Id.* § 8.01-2 (Cum. Supp. 2013).

Three of the Rules of the Supreme Court of Virginia, when referring to a civil action, may include both legal and equitable claims.<sup>105</sup>

The Supreme Court of Virginia has held that an “action” and a “cause of action” are quite different.<sup>106</sup> A cause of action is defined as “a set of operative facts which, under the substantive law, may give rise to a right of action.”<sup>107</sup> A cause of action may give rise to more than one right of action. A “right of action is a remedial right to presently enforce a cause of action.”<sup>108</sup> The definition of a “claim” includes “a cause of action.”<sup>109</sup>

The cause of action which may be nonsuited must be a valid and pending cause of action or claim.<sup>110</sup> Thus, if the suit is a nullity or void ab initio, there is no valid cause of action to nonsuit, and section 8.01-380 is not applicable. However, where a nonsuit order is merely voidable, and not void ab initio, it must be challenged by the defendant within the time frame prescribed by Supreme Court of Virginia Rule 1:1 to avoid becoming final.<sup>111</sup>

The reason why an action is without legal effect is of no consequence. If an action is a nullity, regardless of the reason it is such, then no legal proceeding is pending that can be nonsuited.<sup>112</sup> Some of the circumstances in which the action has been held to be a nullity or void ab initio, so as to preclude nonsuit include, inter alia, the following: (1) Pleadings which were invalid because they were signed by an attorney whose Virginia license had been administratively suspended,<sup>113</sup> and (2) Pleadings brought by liti-

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105. VA. SUP. CT. R. 3:1 (Repl. Vol. 2013).

106. *Trout v. Commonwealth Transp. Comm'r*, 241 Va. 69, 73, 400 S.E.2d 172, 173–74 (1991).

107. *Id.*, 400 S.E.2d at 174; *see also* *Dunston v. Huang*, 709 F. Supp. 2d 414, 418 (E.D. Va. 2010); *McKinney v. Va. Surgical Assoc.*, 284 Va. 455, 460, 732 S.E.2d 27, 29 (2012) (citing *Roller v. Basic Constr. Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989)).

108. *Stone v. Ethan Allan, Inc.*, 332 Va. 365, 368, 350 S.E.2d 629, 631 (1986).

109. BLACK'S LAW DICTIONARY 247 (6th ed. 1990). For the definition of a “cause of action” for the purpose of res judicata, *see All Star Towing, Inc. v. City of Alexandria*, 231 Va. 421, 425, 344 S.E.2d 903, 905–06 (1986).

110. *Johnston Mem'l Hosp. v. Bazemore*, 277 Va. 308, 313, 672 S.E.2d 858, 861 (2009); *Nerri v. Adv-Gyamfi*, 270 Va. 28, 31, 613 S.E.2d 429, 430 (2005).

111. *Singh v. Mooney*, 261 Va. 48, 51–53, 541 S.E.2d 549, 551–52 (2001). *See also infra* Part V.E.2 (discussing the tolling provisions of section 8.01-229(E)(3), which require that a “refiled” cause of action that was previously nonsuited be a valid and pending cause of action or claim).

112. *Bazemore*, 277 Va. at 314, 672 S.E.2d at 861.

113. *See Nerri*, 270 Va. at 29, 613 S.E.2d at 430; *see also Kone v. Wilson*, 272 Va. 59,

gants, such as plaintiffs, or defendants bringing counterclaims, cross claims or third-party claims, who lack standing.<sup>114</sup>

There are other circumstances in which a nonsuit is not permitted, despite the fact that the action is not a nullity or void ab initio.<sup>115</sup> On the other hand, nonsuit is permitted for some non-garden variety causes of action, for example, suit under Code section 64.1-88 to impeach a will<sup>116</sup> and where the plaintiff is deceased and his personal representative has not been substituted as a party plaintiff.<sup>117</sup>

A nonsuit may be taken only in a trial proceeding—"it is unsuited to purely appellate procedure."<sup>118</sup> Thus, when a circuit court acts as a reviewing tribunal, rather than a trial court resolving issues in the first instance, the matter may not be nonsuited.<sup>119</sup>

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63, 630 S.E.2d 744, 746 (2006).

114. See *Bazemore*, 277 Va. at 315, 672 S.E.2d at 861-62 (action brought as administratrix of decedent's estate before qualifying therefor); see also *Kocher v. Campbell*, 282 Va. 113, 118-19, 712 S.E.2d 477, 480-81 (2011) (action for personal injury brought by motorist whose claim was still part of his bankruptcy estate). *Bazemore* distinguished earlier decisions, such as *The Chesapeake House on the Bay, Inc. v. Virginia National Bank*, prohibiting the substitution of a new plaintiff for an original plaintiff who lacked standing. *Bazemore*, 277 Va. at 314-15, 672 S.E.2d at 861-62. The *Chesapeake House on the Bay* court stated that in such situations "the sole remedy is a nonsuit followed by a new action brought in the name of a proper plaintiff." *The Chesapeake House on the Bay, Inc. v. Va. Nat'l Bank*, 231 Va. 440, 443, 344 S.E.2d 913, 915 (1986). Such language, on its face, would appear to authorize a nonsuit when the plaintiff lacks standing. *Bazemore* rejected such a conclusion, emphasizing that no party in these cases questioned whether a legal proceeding that is a nullity can nevertheless be nonsuited and "when the issue was squarely presented in *Nerri*, we clearly held that a proceeding that has no legal effect, i.e., one that is a nullity, cannot be nonsuited." *Bazemore*, 277 Va. at 314-15, 672 S.E.2d at 861.

115. See, e.g., *Trout v. Commonwealth*, 241 Va. 69, 75, 400 S.E.2d 172, 174-75 (1991) (condemnation proceedings); *Anonymous C. v. Anonymous B.*, No. 2232-09-2, 2011 Va. App. LEXIS 14, at \*4 (Va. Ct. App. Jan 11, 2011) (actions filed under VA. CODE ANN. § 16.1-253).

116. See, e.g., *Vaughn v. First Liberty Ins. Co.*, No. 3:09-cv-364, 2009 U.S. Dist. LEXIS 108045 (E.D. Va. 2009) (a petition to appoint an umpire to resolve a dispute between the parties' appraisers); *Gerensky-Greene v. Gerensky*, No. 1801-11-4, 2012 Va. App. LEXIS 206, at \*12 (Va. Ct. App. June 19, 2012); *Karafas v. Atkins*, 56 Va. Cir. 193 (2001) (Spotsylvania County) (actions to modify custody and visitation brought under Virginia Code section 20-108).

117. See, e.g., *Meador v. Cray*, 79 Va. Cir. 286 (2009) (Roanoke County).

118. *Thomas Gremmell, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 97, 184 S.E. 457, 458 (1936).

119. See *Bd. of Zoning Appeals v. Bd. of Supervisors*, 275 Va. 452, 457, 459, 657 S.E.2d 147, 149-50 (2008); see also *Joy House Senior Homes, L.C. v. Jones*, 75 Va. Cir. 140 (2008) (Fairfax County). In an appeal of a final agency action of the Virginia Department of So-

## 2. Nonsuit Before Jury Retires

Under Virginia Code section 8.01-380(A), nonsuit is not permitted after “the jury retires from the bar.”<sup>120</sup> This stage of the proceedings is clear-cut and well understood. It identifies the time after the case has been submitted to the jury, and it has retired from the courtroom.<sup>121</sup> Once this occurs, a nonsuit is not timely, even if the jury verdict is subsequently set aside for errors of law in the jury instructions.<sup>122</sup>

## 3. Nonsuit Before Motion to Strike Sustained

Virginia Code section 8.01-380(A) also prohibits nonsuit after “a motion to strike the evidence has been sustained.”<sup>123</sup> This stage of the proceedings is also clear-cut and well understood. Until the motion to strike has been actually *sustained*, nonsuit is timely. Thus, a nonsuit may be taken during the course of the trial court’s discussion, analysis or explanation of its proposed ruling on the motion to strike, but prior to the actual ruling thereon.<sup>124</sup> Neither a clear indication by the court of how it will rule, nor its intention or inclination to sustain the motion to strike, nor the plaintiff’s surmising what the court’s ruling will ultimately be, will preclude the right to nonsuit in the absence of an actual rul-

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cial Services, the circuit court acts as a reviewing tribunal and the matter may not be nonsuited. *Jones*, 75 Va. Cir. at 146.

120. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2013). This was the rule embodied in the initial Virginia nonsuit statute. *Sweeney*, *supra* note 7, at 752; *Tucker*, *supra* note 1, at 362.

121. *Harrison v. Clemens*, 112 Va. 371, 373, 71 S.E. 538, 538 (1911); *Mallory v. Taylor*, 90 Va. 348, 349–50, 18 S.E. 438, 439 (1893); *accord Richardson v. Hall*, 26 Va. Cir. 349 (1992) (Wise County) (nonsuit not permitted two hours after jury retires and begins deliberating); *see also* W.R. Habeeb, Annotation, *What Amounts to “Final Submission” or “Retirement of Jury” Within Statute Permitting Plaintiff to Take Voluntary Dismissal or Nonsuit Without Prejudice Before Submission or Retirement of Jury*, 31 A.L.R.3d 449, 498–512, §§ 23–31 (1970).

122. *Moyer v. Prinkey & Son, Inc.*, 14 Va. Cir. 56, 57 (1987) (City of Alexandria).

123. VA. CODE ANN. § 8.01-380(A); *see also* *Etherton v. Doe*, 268 Va. 209, 212, 597 S.E.2d 87, 89 (2004) (“A motion to strike the plaintiff’s evidence should be granted only when it plainly appears that the court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it.”).

124. *See Hilb, Rogal and Hamilton Co. v. DePew*, 247 Va. 240, 245, 440 S.E.2d 918, 921 (1994); *Homeowner’s Warehouse, Inc. v. Rawlins*, 242 Va. xiii, xiii, 409 S.E.2d 115, 115 (1991); *Newton v. Veney*, 220 Va. 947, 952, 265 S.E.2d 707, 710–11 (1980); *Berryman v. Moody*, 205 Va. 516, 518–19, 137 S.E.2d 900, 901–02 (1964).

ing.<sup>125</sup> The motion to strike is not ruled upon or decided until the court, in fact, sustains or overrules the motion.<sup>126</sup>

Significantly, the prohibition against nonsuit after a motion to strike has been “sustained” occurs immediately upon the *oral* pronouncement of the trial court’s decision. A written order of the court is not required—a departure from the normal rule in Virginia, which is that “a court of record speaks only through its written orders.”<sup>127</sup> Nevertheless, while an order is not needed to effectuate the right to a nonsuit, “[c]ourts act by orders and decree . . . [and] [t]here is no termination of litigation until the court enters an appropriate order.”<sup>128</sup> Moreover, it is the date of the entry of the order, not the date of the oral grant of nonsuit, which triggers the six-month period from the entry of the nonsuit order<sup>129</sup> for refilling a nonsuited action prescribed in Virginia Code section 8.01-229(E)(3).<sup>130</sup> However, as discussed subsequently in

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125. *Berryman*, 205 Va. at 518–19, 137 S.E.2d at 902.

126. *Newton*, 220 Va. at 952, 265 S.E.2d at 710.

127. *Hill v. Hill*, 227 Va. 569, 578, 318 S.E.2d 292, 297 (1984); *see also* *Haring v. Stephenson*, 8 Va. Cir. 381, 382 (1987) (Fairfax County) (citations omitted). *But see Homeowner’s Warehouse Inc.*, 242 Va. at xiv–xvi, 409 S.E.2d at 115–17 (Russell, J. and Hassell J., dissenting) (criticizing the state of the law, and arguing for its replacement with the normal rule that a court of record speaks only through its written orders).

128. *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984) (citations omitted); *see* *Bowie v. Murphy*, 271 Va. 126, 132 n.5, 624 S.E.2d 74, 78 n.5 (2006) (citing *Nash*, 227 Va. at 277, 319 S.E.2d at 829). Therefore, the plaintiff may reconsider his decision to take a nonsuit before the entry of such an order. *Nash*, 227 Va. at 237, 315 S.E.2d at 829. While he has no right to withdraw the nonsuit, he has a right to move the trial court to permit withdrawal, which the court may determine in its judicial discretion. *Id.*; *see also* *Richardson v. Hall*, 26 Va. Cir. 349, 350–51 (1992) (Wise County). Moreover, to the extent that an ordinarily nonappealable nonsuit is a final judgment for purposes of appeal under *Wells v. Lorcom House Condo. Council of Co-Owners*, 237 Va. 247, 251, 377 S.E.2d 381, 383 (1989), it becomes so only after the entry of an order of nonsuit. *See also infra* Part VI (discussing the appealability of an order granting nonsuit).

129. *See* *Laws v. McIlroy*, 283 Va. 594, 601–03, 724 S.E.2d 699, 703–04 (2012) (citations omitted) (holding that “from” means the six month period *runs both forward and backward* from the date of the nonsuit order).

130. The 1988 amendment to Virginia Code § 8.01-229(E)(3) substituted the phrase “of the order entered by the Court” for the phrase “he suffers such nonsuit,” clearly making the entry of a nonsuit order the triggering event for the six-month period prescribed therein. Act of April 10, 1988, ch. 711, 1988 Va. Acts 934, 935 (codified as amended at VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 1988)). Prior to the 1988 amendment, courts considered the prescribed six-month period to commence when the plaintiff moved for nonsuit, not when the court subsequently entered the nonsuit order. *See, e.g., Haring*, 8 Va. Cir. at 382; *Burton v. Fifer*, 5 Va. Cir. 230, 230–31 (1985) (City of Charlottesville). The Supreme Court of Virginia considered this language, “of the order entered by the Court,” in *Phipps v. Liddle*, 267 Va. 344, 345–46, 593 S.E.2d 193, 194 (2004). In *Phipps*, the issue was whether the quoted phrase referred to the trial court’s order originally granting the nonsuit, which was appealed to the supreme court, or to the trial court’s subsequent order,

Part VII of this article, the entry of an order of nonsuit may properly be delayed to permit the court to hear and decide a motion for sanctions against the plaintiff for *prior* conduct warranting such action by the court specifically stating in the nonsuit order that it is retaining jurisdiction for that purpose, or suspending the effectiveness of the order.<sup>131</sup>

#### 4. Nonsuit Before Action Submitted for Decision

The third prohibition of section 8.01-380(A) is the denial of a nonsuit after “the action has been *submitted to the court for decision*.”<sup>132</sup> This provision of the Code of Virginia, first introduced in 1954, primarily applies to bench trials; however, it applies in both jury and bench trials when the court is deciding a case-dispositive matter.<sup>133</sup>

The stage at which an action has been “submitted”<sup>134</sup> to the court for decision, within the meaning of section 8.01-380(A), has been carefully described by the Supreme Court of Virginia. In *Moore v. Moore*, a divorce action, the court rejected both the “mere filing by the commissioner of his report, without more,” as a “‘submission’ of the cause to the trial court for decision,” and “the unilateral act of [the] defendant of forwarding to the court a sketch [proposal] for a decree.”<sup>135</sup> However, the court provided

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after the supreme court affirmed, entering the supreme court’s mandate “as its own” order. *Id.* at 345–46, 593 S.E.2d at 194. The supreme court held that the quoted phrase referred to the trial court’s subsequent order. *Id.* at 347, 593 S.E.2d at 199. Because the trial court’s original order was subject to change, as a result of the appeal, the plaintiff was not finally entitled to the nonsuit until the appeal was resolved in his favor, and the trial court entered “as its own” the mandate of the supreme court affirming the trial court’s original order granting nonsuit. *Id.* at 347, 593 S.E.2d at 195. *Phipps* will be discussed subsequently in connection with statute of limitations applicable to a nonsuited action. See *infra* note 457 and accompanying text (discussing the appealability of an order of nonsuit).

131. See *infra* Part VII.

132. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2013) (emphasis added); see *supra* Part V.A.1 (discussing “action” and “cause of action”).

133. See *Rasnick v. Pittston Co.*, 5 Va. Cir. 336, 340–41 (1986) (Wise County) (submitting an action to the court for decision, under section 8.01-380(A), refers to a bench trial without a jury after all the evidence and arguments have been submitted to the judge for final decision, or to a preliminary motion finally dispositive on the merits).

134. For a general discussion of “submission,” as a stage beyond which nonsuit is statutorily barred, see 27 C.J.S. *Dismissal & Nonsuit* § 21 (1999).

135. 218 Va. 790, 795, 240 S.E.2d 535, 538 (1978). The court did not explain why it referred to the submission of “the cause,” see *id.*, when section 8.01-380(A) refers only to the submission of “the action” for decision. However, Black’s Law Dictionary includes “a suit, litigation, or action” within the definition of “cause.” BLACK’S LAW DICTIONARY 211 (6th ed.

guidance as to the occurrence of a “submission” under the procedural circumstances of the *Moore* case, wherein both litigants were represented by counsel who had filed pleadings in the cause. A “submission” would have occurred in *Moore* if the parties, by counsel,

*both* yielded the issues to the court for consideration and decision, . . . either as the result of oral or written argument, formal notice and motion, or by tendering a jointly endorsed sketch for a decree (or in the case of disagreement over the form, two separate drafts upon notices and motion).<sup>136</sup>

After *Moore*, the Supreme Court of Virginia provided its next explanation of a “submission” under section 8.01-380(A) in a trilogy of three cases, all decided on March 3, 1989. In *Khanna v. Dominion Bank of Northern Virginia N.A.*, the Court found that the defendants’ motion for nonsuit of their counterclaim came too late, inasmuch as “their action already had been decided and the court had announced its decision. It would be absurd to hold that a claimant could suffer a nonsuit as a matter of right after a court had decided the claim.”<sup>137</sup> The facts supporting this conclusion in *Khanna* included the plaintiff’s motion for summary judgment, seeking dismissal of the counterclaim, upon which there was a hearing and argument of counsel.<sup>138</sup> The trial court took the motion under advisement, after which the plaintiff filed a supple-

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1990). The court observed that “such a report may repose in the file in the clerk’s office for many months for any number of reasons before the cause is brought to the attention of the chancellor for adjudication.” *Moore*, 218 Va. at 795, 240 S.E. at 538; *Breckner v. Hallen*, 36 Va. Cir. 79, 79, 82 (1995) (Spotsylvania County). However, the early rule in equity barred voluntary nonsuit if the parties had agreed to refer any issue to a master. 5 MOORE’S FEDERAL PRACTICE ¶ 41.02 [1], at 41–16 (2d ed. 1996) [hereinafter MOORE]; see *Am. Bell Tel. Co. v. W. Union Tel. Co.*, 69 F. 666, 669–70 (1st Cir. 1895); *Holcomb v. Holcomb*, 23 F. 781, 781–82 (E.D. Mich. 1885); *Fulford v. Converse*, 54 N.H. 543, 544–45 (1871); *Pollard v. Moore*, 51 N.H. 188, 190–92 (1871); A.S. Frank, Annotation, *Stage of Trial at Which Plaintiff May Take Voluntary Nonsuit, Dismissal, or Discountenance*, 89 A.L.R. 13, 99–105 (1934), supplemented by 126 A.L.R. 284, 302–04 (1940).

136. *Moore*, 218 Va. at 795–96, 240 S.E.2d at 538; *accord* *Transcon. Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 514, 551 S.E.2d 313, 319 (2001) (citing *Moore*, 218 Va. at 795, 240 S.E.2d at 538).

137. 237 Va. 242, 244–45, 377 S.E.2d 378, 380–81. This principle was at the heart of *Dalloul v. Agbey*, 255 Va. 511, 512, 514–15, 499 S.E.2d 279, 280–82 (1998) (denying the plaintiff’s nonsuit as to those claims which the court had previously dismissed with prejudice or otherwise eliminated from the case). See also *Shank v. Miller Bros., Inc.*, 56 Va. Cir. 39, 39–40 (2001) (Fairfax County); *Dove v. Boseman*, 27 Va. Cir. 55, 55–56 (1991) (Fairfax County).

138. *Khanna*, 237 Va. at 243, 377 S.E.2d at 379.

mental brief.<sup>139</sup> Subsequently, plaintiff's counsel received a telephone call from the judge's office, "indicating that the judge had decided to grant the plaintiff's motion for summary judgment . . . and asking counsel to prepare the appropriate order for submission to the defendants for review."<sup>140</sup> Plaintiff's counsel notified defendants' counsel of the substance of this telephone message, and mailed to the latter, for endorsement, a draft order reflecting the court's ruling.<sup>141</sup> Before the draft order was endorsed, defendants' counsel filed the motion to nonsuit the counterclaim.<sup>142</sup> That motion, *Khanna* held, "came too late."<sup>143</sup>

The second of the March 3, 1989 trilogy was *Wells v. Lorcom House Condominiums' Council*, which held that the action had been submitted to the trial court for decision, under section 8.01-380(A), when *any* of the defendants' pleadings submitted to the court "were case dispositive if the court ruled in favor of the defendants," and "no one, neither the trial judge nor the attorneys, contemplated that any further action, such as briefing," was necessary for the court to decide the issues.<sup>144</sup> The defendants' "case dispositive" pleadings, upon which the parties had joined issues, and which were argued to the trial court, consisted of a plea in bar (based on various statutes of limitation), a demurrer attacking the legal sufficiency of the plaintiffs' amended motion for judgment, and a motion to dismiss.<sup>145</sup> Even though the trial court

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139. *Id.* at 243–44, 377 S.E.2d at 379.

140. *Id.* at 244, 377 S.E.2d at 380.

141. *Id.*

142. *Id.*

143. *Id.* at 246, 377 S.E.2d at 381.

144. 237 Va. 247, 252, 377 S.E.2d 381, 384 (1989).

145. However, an order sustaining a demurrer is not a final order unless it goes further and dismisses the case. *Norris v. Mitchell*, 255 Va. 235, 239, 495 S.E.2d 809, 811 (1998) (citing *Bibber v. McCreary*, 194 Va. 394, 396–97, 73 S.E.2d 382, 383–84 (1952)) (noting that an order granting a demurrer becomes a final order if it gives plaintiff leave to amend, and the plaintiff fails to do so within the time specified therefor); *accord* *The Berean Law Group, P.C. v. Cox*, 259 Va. 622, 626, 528 S.E.2d 108, 111 (2000). Accordingly, if the order sustaining a demurrer has become a final order, a motion for nonsuit filed more than twenty-one days after the date of that final order is untimely. *Id.* at 626, 528 S.E.2d at 111; *Liddle v. Phipps*, 263 Va. 391, 396, 559 S.E.2d 690, 693 (2002); *see also* *Sue v. Park*, 70 Va. Cir. 113, 115, 124 (2005) (Fairfax County) (finding that an order sustaining a demurrer with leave to amend, but which did not dismiss the relevant counts, was not a final order after the expiration of the period during which the amended pleading could have been filed and the plaintiff was entitled to an initial nonsuit, because the defendant's motion to enter a final order, based on the plaintiff's failure to file an amended pleading, implicitly acknowledged that the case had not been finally submitted to the court).

*Sue v. Park* also explained that to rule that an order sustaining a demurrer, but grant-

had retained these pleadings under advisement for over nine months without ruling thereon before granting the plaintiff a nonsuit, *Wells* held that the action had been “submitted to the court for decision,” the request for nonsuit came too late, and the trial court erred in granting the request.”<sup>146</sup>

The last of the March 3, 1989 trilogy was *City of Hopewell v. Cogar*, holding that the action had not been “submitted to the court for decision” under section 8.01-380(A) when the plaintiff’s motion for nonsuit was made within the fifteen-day period allowed by the trial court for each party to submit simultaneous memoranda in support of their respective positions on the defendants’ motion for summary judgment.<sup>147</sup> Even though the parties had argued the summary judgment motion, the fifteen-day period allowing for the tender of memoranda postponed the “submission” of the case-dispositive motion until the expiration of that period.<sup>148</sup> Accordingly, unlike *Wells*, in *City of Hopewell* “something remained to be done before the action properly could have been decided by the court.”<sup>149</sup> The legal effect of the fifteen-day grace period in *City of Hopewell* “was to postpone ‘submission’ of the matter” for the full grace period.<sup>150</sup> Had the plaintiff waited until the expiration of the fifteen-day period, “submission” would have then occurred, and nonsuit would have thereafter been precluded by the statute.<sup>151</sup>

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ing leave to amend, becomes final upon expiration of the time designated for amendment, even if the order does not dismiss the case, would preclude a court from exercising its discretion to allow further extensions of time, in direct contravention of the plain language of Rule 1.9. 70 Va. Cir. at 121–22. *But see* Griffin v. Griffin, 183 Va. 443, 449–50, 32 S.E.2d 700, 702 (1945) (supporting that an order or decree merely sustaining a demurrer with leave to amend becomes final upon the expiration of the time frame in which the amended pleading would have been filed); Gimbert v. Norfolk S. R.R. Co., 152 Va. 684, 689, 148 S.E. 680, 682 (1929) (dictum). *Sue v. Park* rejected that dictum on the basis that “the language contained in myriad decisions of the Supreme Court of Virginia supports the conclusion that an order sustaining a demurrer must also dismiss the case for it to be a final order, even if leave to amend is granted and no amended pleadings are filed within the time frame set out in the order.” 70 Va. Cir. at 121 (citations omitted).

146. 237 Va. at 252, 377 S.E.2d at 384. *Wells* was presaged by *Figliuzzi v. Schuiling*, 17 Va. Cir. 11 (1988) (Fairfax County), which held that a nonsuit comes too late after a plea in bar in equity has been argued and submitted to the court for decision.

147. *City of Hopewell v. Cogar*, 237 Va. 264, 266–67, 377 S.E.2d 385, 386–87 (1989).

148. *Id.* at 267, 377 S.E.2d at 387.

149. *Id.*

150. *Id.*

151. *Id.*

Subsequent to *Moore, Khanna, Wells*, and *City of Hopewell*, numerous cases in various Virginia courts have turned on whether a nonsuit was barred because the action had been submitted to the court for decision. Illustrated below are some of those cases which have held that there had been no submission,<sup>152</sup> and others which found that a submission had occurred.<sup>153</sup>

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152. See, e.g., *AAA Disposal Servs., Inc. v. Eckert*, 267 Va. 442, 446–47, 593 S.E.2d 260, 263 (2004) (finding that personal injury action was not ended, and no submission to the court for decision had occurred, where plaintiff was not willing to accept principal and interest contained in defendant's confession of judgment); *Ford Motor Co. v. Jones*, 266 Va. 404, 407, 587 S.E.2d 579, 581 (2003) (finding that even though the plaintiff's claims were submitted to the jury in the first trial of the case, after the case was reversed and remanded on appeal for a new trial, plaintiff was entitled to nonsuit at the new trial, since none of the issues had been previously eliminated under the law of the case doctrine, or dismissed with prejudice, or otherwise eliminated); *Liddle v. Phipps*, 263 Va. 391, 396, 559 S.E.2d 690, 693 (2002) (finding that motion for nonsuit was not untimely, despite a discovery order stating that the sanction for failure to comply with the deadline would be dismissal); *Transcon. Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 515–16, 551 S.E.2d 313, 320 (2001) (finding that where plaintiff's motion for judgment contained alternative causes of action against different defendants, yielding to the trial court for decision an issue involving only the plaintiff and one defendant did not yield the issue of the plaintiff's cause of action against the other defendant, or preclude plaintiff from nonsuiting its action against the other defendant); *Bremer v. Doctor's Bldg. P'ship*, 251 Va. 74, 80, 465 S.E.2d 787, 791 (1996) (finding that the trial court's ruling construing warranties in purchase agreement did not resolve any issue of liability, and did not involve submission of the action to the court for decision; therefore nonsuit not barred); *Gerensky-Greene v. Gerensky*, No. 1801-11-4, 2012 Va. App. LEXIS 206, at \*5 (Va. Ct. App. June 19, 2012) (unpublished decision) (finding that the trial court had not resolved the cause of action or claim before it when plaintiff moved for a nonsuit, and the parties had not concluded presenting oral arguments on the issue); *Division of Child Support Enforcement ex rel. Abediyi v. Ferguson*, 77 Va. Cir. 341, 342 (2008) (City of Roanoke) (allowing further submissions from the contemplated parties and further evidence); *Hernandez v. Awld*, 73 Va. Cir. 497, 499 (2007) (Loudoun County) (finding that plaintiff's motion for a second nonsuit was made before the defendant's motion to dismiss was submitted to the court for decision).

153. *Bio-Medical Applications of Va., Inc. v. Coston*, 272 Va. 489, 494–95, 634 S.E.2d 349, 351–52 (2006) (finding that the parties had completed their oral arguments on a motion for summary judgment that, if granted, would have been dispositive, and the trial court had explicitly announced its ruling); *Atkins v. Rice*, 266 Va. 328, 332, 585 S.E.2d 550, 552 (2003) (finding that the defendant's motion to dismiss had been submitted to the court for decision, so as to bar plaintiff's nonsuit, where both parties had filed written memoranda in support of their positions on defendant's motion to dismiss, no further written submissions were contemplated, and the parties had already had the opportunity to present oral argument and evidence); *Dalloul v. Agbey*, 255 Va. 511, 514–15, 499 S.E.2d 279, 281–82 (1998) (finding that once a trial court has decided a particular claim, that portion of the action has been submitted to the court for decision; therefore plaintiff was denied nonsuit as to those claims which the court had previously dismissed with prejudice or otherwise eliminated from the case.); *Fulcher v. Va. Elec. & Power Co.*, 60 Va. Cir. 199, 213 (2002) (City of Norfolk) (holding that submission occurred when oral argument had been heard on the motions for summary judgment; memoranda of law had been submitted by the parties; and nothing was left for the parties to do on those dispositive motions); *Johnson v. Jefferson Nat'l Bank*, 24 Va. Cir. 467, 469 (1991) (City of Charlottesville), *rev'd*

The basic principles governing when a matter is to be considered submitted to the court for decision includes the following.

For a matter to be submitted to the court, no particular form or procedure is required. An action may be submitted either as the result of oral or written argument, formal notice and motion, or by tendering a jointly endorsed sketch for a decree.<sup>154</sup> Also, a matter is deemed submitted when the parties by counsel have yielded the issues to the court for consideration and decision,<sup>155</sup> but is not deemed submitted when further submissions from the parties are contemplated.<sup>156</sup> Further, the Supreme Court of Virginia has generally found a matter to have been submitted when the parties have fully argued all issues and all that remains is a judge's decision,<sup>157</sup> but even after a matter has been fully argued, the matter has not been submitted until the judge has recessed to consider the parties' arguments and to make a ruling.<sup>158</sup> Additionally, if it is clear that additional actions on the part of the parties are contemplated, the matter is not submitted to the court.<sup>159</sup>

If a case has been "submitted for decision" to a general district court, and the case is appealed to the circuit court, the plaintiff is entitled to a first nonsuit of right at the circuit court.<sup>160</sup> Such an appeal entitles the plaintiff to a trial de novo, at which all rulings and judgments of the general district court are completely null and void and of no consequence, permitting the appealing plain-

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*on other grounds* 244 Va. 482, 422 S.E.2d 778 (1992) (granting twenty-one days to plaintiff to file a memorandum, and ten days thereafter for defendant to file a reply; when plaintiff never filed a memorandum there was nothing to which defendant could reply, thereby submitting the action to the court for decision on the defendant's earlier plea in bar and rendering plaintiff's subsequent motion for nonsuit untimely); *Walker v. Walker*, 19 Va. Cir. 390, 392 (1990) (Clarke County) (denying nonsuit when suit was before the court on exceptions to the report of the commissioner in chancery, with memoranda of law having been filed, oral arguments tendered, and counsel jointly requesting to know when a decision would be forthcoming); *Figliuzzi v. Schuiling*, 17 Va. Cir. 11, 12 (1988) (Fairfax County) (denying nonsuit when counsel had concluded their arguments, and the court had orally sustained defendant's plea in bar, albeit no written order had been entered).

154. *Figliuzzi*, 17 Va. Cir. at 11 (citing *Moore v. Moore*, 218 Va. 790, 795-96, 240 S.E.2d 535, 538 (1978)).

155. *Atkins*, 266 Va. at 331, 585 S.E.2d at 551 (citing *Transcon. Ins. Co.*, 262 Va. at 514, 551 S.E.2d at 319).

156. *Id.*, 585 S.E.2d at 551-52 (citing *Liddle*, 263 Va. at 394, 559 S.E.2d at 692).

157. *Wells v. Lorcom House Condo. Council*, 237 Va. 247, 252, 377 S.E.2d 381, 384 (1989).

158. *Kelly v. Carrico*, 256 Va. 282, 286, 504 S.E.2d 368, 370 (1998).

159. *City of Hopewell v. Cogar*, 237 Va. 264, 267, 377 S.E.2d 385, 387 (1989).

160. *Joseph v. Giant Food, Inc.*, 61 Va. Cir. 143, 146 (2003) (Fairfax County).

tiff to take a nonsuit of her case “even if the case was in fact ‘submitted to the general district court for decision.’”<sup>161</sup>

#### 5. Differentiating the Nonsuit Bars Under the First and Third Branches of Virginia Code Section 8.01-380(A)

The preclusive bar of a nonsuit under the first and third branches of section 8.01-380(A) is governed by different rules. Under the first branch, involving motions to strike the evidence, the bar does not become effective until the trial court actually sustains the motion to strike the evidence.<sup>162</sup> Thus, under the first branch, a nonsuit is timely if taken while the trial judge is explaining his ruling, so long as he has not actually sustained the motion to strike. However, under the third branch, concurred with whether the case has been submitted to the court for decision when the nonsuit motion was made, the bar applies even if the court has not ruled, if both parties have yielded the issues to the court for consideration and decision.<sup>163</sup>

#### 6. Additional Bars to Nonsuit Under Virginia Code Section 8.01-380(A)

In addition to the statutory bars enumerated therein, section 8.01-380(A) will also bar nonsuit in a partition case after the court has decreed the sale of the land.<sup>164</sup> However, a rule to show cause why the plaintiff's case should not be dismissed for his failure to appear at his scheduled deposition was not a bar to the plaintiff's nonsuit in *Bivens v. Hyatt*.<sup>165</sup>

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161. *Id.* (citing *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 327, 497 S.E.2d 740, 742 (1998)); *Thomas Gemmill, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 99, 184 S.E. 457, 458 (1936)); *see infra* Part VI (discussing nonsuits in cases appealed to or refiled in circuit court).

162. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2013).

163. *See Bio-Medical Applications of Va., Inc. v. Coston*, 272 Va. 489, 493–94, 634 S.E.2d 349, 351–52 (2006) (discussing *Berryman v. Moody*, 205 Va. 516, 518–19, 137 S.E.2d 900, 902 (1964)); *Atkins v. Rice*, 266 Va. 328, 331, 585 S.E.2d 550, 551 (2003); *Newton v. Veney*, 220 Va. 947, 952, 265 S.E.2d 707, 711 (1980).

164. *Long v. Rucker*, 16 Va. Cir. 468, 469–70 (1978) (Bath County).

165. 6 Va. Cir. 447, 454–55 (1969) (City of Norfolk).

## 7. Venue Issues

Section 8.01-380(A) contains two venue provisions. The first provides that after a nonsuit, no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit is taken, unless that court is without jurisdiction, not a proper venue, “other good cause” is shown for proceeding in “another court,” or such new proceeding is in a federal court.<sup>166</sup>

This first venue provision applies only to proceedings previously initiated and nonsuited in Virginia state courts. It does not preclude a party from filing a cognizable cause of action in Virginia courts even though he or she has previously filed and nonsuited the same action in a jurisdiction other than Virginia.<sup>167</sup>

The purpose of the venue restriction is to prevent a claimant who has filed a suit in a Virginia court and invoked the power of that jurisdiction from abusing the rights and privileges of which he has availed himself by indiscriminately or strategically refile his suit in another Virginia court.<sup>168</sup>

The “other good cause” aspect of the first venue provision was considered in *American Express Centurion Banks v. Tsai*.<sup>169</sup> *Tsai* involved a single credit card debt as the subject of an action nonsuited in general district court, which was refiled in circuit court in a suit consolidating the original and all other credit card debts.<sup>170</sup> The court held that refile the action in circuit court, rather than in general district court, was proper.<sup>171</sup> “Other good cause” for such proceeding was predicated upon consideration of the identity of the parties and counsel, and the fact that one trial would limit the expenditures for the parties, witnesses, and the courts.<sup>172</sup> Otherwise, two or three trials would be required in general district court to hear the refiled action and additional actions on the other credit card debts.

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166. VA. CODE ANN. § 8.01-380(A).

167. *Clark v. Clark*, 11 Va. App. 286, 290, 398 S.E.2d 82, 84 (1990) (upholding the circuit court’s ruling permitting a husband who had previously filed and voluntarily nonsuited a divorce action in Switzerland to refile his divorce action in Virginia).

168. *Id.* at 294, 398 S.E.2d at 86.

169. 73 Va. Cir. 358, 359 (2007) (Fairfax County).

170. *Id.* at 358–59.

171. *Id.* at 359.

172. *Id.*

The “good cause” provision was also considered in *Verdolotti v. Chung*.<sup>173</sup> There, the action originated in the Portsmouth Circuit Court.<sup>174</sup> While that suit was pending, the plaintiff filed a separate action in the Circuit Court for the City of Suffolk, making the same damage claim, and then nonsuited that action.<sup>175</sup> It was never refiled in Suffolk, but proceeded in the Portsmouth Circuit Court.<sup>176</sup> That court considered that the facts of the case presented a sound argument for “good cause . . . for proceeding in another court.”<sup>177</sup> The suit was against defendants who regularly practiced medicine in Portsmouth, rather than Suffolk, and who treated the plaintiff’s decedent while she was a patient at a Portsmouth hospital.<sup>178</sup> These ties to Portsmouth provided “good cause” for refileing in Portsmouth, rather than the nonsuit jurisdiction.<sup>179</sup>

The Supreme Court of Virginia examined the jurisdictional portion of the first venue provision in *Conner v. Rose*.<sup>180</sup> The plaintiff therein filed a warrant in debt in general district court, seeking \$4,000 on a breach of warranty claim.<sup>181</sup> After the action was transferred from the Richmond City General District Court to the Henrico County General District Court on the defendant’s motion, the plaintiff nonsuited.<sup>182</sup> When the plaintiff refiled her action in circuit court, and amended her ad damnum clause to seek damages of \$11,000 for both breach of warranty and fraud, the circuit court dismissed, on the ground that section 8.01-380(A) required the nonsuited action to be refiled in general district court.<sup>183</sup> In reversing the trial court, the Supreme Court of Virginia held that section 8.01-380(A) “permits [Conner] to [re]file her action in the circuit court because the *ad damnum* clause in her motion for judgment exceeds the jurisdictional limit [of

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173. 56 Va. Cir. 358, 359 (2001) (City of Portsmouth).

174. *Id.* at 358.

175. *Id.* at 359.

176. *Id.*

177. *Id.* at 361 (quoting VA. CODE ANN. § 8.01-380).

178. *Id.*

179. *Id.*

180. 252 Va. 57, 471 S.E.2d 478 (1996).

181. *Id.* at 58, 471 S.E.2d at 478.

182. *Id.*

183. *Id.*

\$10,000] and, therefore, the general district court lack[ed] jurisdiction over her action.”<sup>184</sup>

The first venue provision of section 8.01-380(A) has been interpreted, by its plain meaning, to apply “only where a new proceeding is brought after a nonsuit is taken in an action previously filed.”<sup>185</sup>

Virginia Code section 8.01-380(A) also contains a second venue provision: “If after a nonsuit an improper venue is chosen, the court shall not dismiss the matter but shall transfer it to the proper venue upon motion of any party.”<sup>186</sup> This provision authorizes the transfer to the proper venue of a new action filed in the same venue as a prior nonsuited action where, even though venue was correct when the first action was filed, it ceased to be so before the new action was filed. For example, the defendants no longer regularly conduct their business or affairs in the first venue.<sup>187</sup>

#### B. *Virginia Code Section 8.01-380(B): Additional Nonsuits*

As discussed in Part II of this article, section 8.01-380(B) was amended in the 2013 General Assembly by H.B. 1709 and its Senate identical twin, S.B. 903, by changing the phrase “reasonable *attorneys’* fees” to “reasonable *attorney* fees.”<sup>188</sup> The patron of H.B. 1709, Delegate Habeeb, advised the author of this article that this amendment was not substantive, but a stylistic change, part of the plan of the Division of Legislative Services to change the phrase “reasonable *attorneys’* fees” to “reasonable *attorney* fees” throughout the Code of Virginia whenever the General As-

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184. *Id.*, 471 S.E.2d at 478–79. A more detailed discussion of nonsuits in cases appealed to or refiled in circuit court from general district court is found subsequently in Part VI of this article.

185. *Moore v. Gillis*, 239 Va. 239, 241, 389 S.E.2d 453, 454 (1990) (rejecting an application of the first venue limitation of section 8.01-380(A) to the prosecution of a second proceeding brought by a plaintiff in another court on the same claim *prior* to the time that the first proceeding was nonsuited).

186. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2013).

187. *See, e.g.*, *Coward v. Family Physicians of Chester, P.C.*, 36 Va. Cir. 404, 404 (1995) (City of Richmond).

188. H.B. 1709, Va. Gen. Assembly (Reg. Sess. 2013) (codified as amended at VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013)); S.B. 903, Va. Gen. Assembly (Reg. Sess. 2013) (codified as amended at VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013)).

sembly amends a code section containing that phrase.<sup>189</sup> This amendment, advised Delegate Habeeb, despite the change from plural to singular, does not limit the costs and fees prescribed in section 8.01-380(B) to those of a single attorney.<sup>190</sup>

Section 8.01-380(B) permits only one nonsuit, as a matter of right, to a cause of action or against the same party to the proceeding.<sup>191</sup> An additional nonsuit is neither automatic nor a matter of right. However, counsel may stipulate to additional nonsuits, and additional nonsuits may be allowed by the court, which may assess costs and reasonable attorneys' fees against the non-suiting party.<sup>192</sup>

The limitation on additional nonsuits in section 8.01-380(B) applies only when one nonsuit as a matter of right has been taken.<sup>193</sup> Therefore, when a suit is brought by a plaintiff who lacks standing to bring the action, and that plaintiff nonsuits, a subsequent action by another plaintiff with standing to bring the suit may be nonsuited as a matter of right. Since the first action was a nullity, so was its nonsuit. Accordingly, as the court identified in *Brake v. Payne*, the nonsuit of the subsequent action constitutes the first nonsuit.<sup>194</sup>

The holding of *Brake v. Payne* was at issue in *Halatyn v. Miller*, where the court held that a prior nonsuit of right by a minor in his own name precluded him from suffering a nonsuit of right to the same causes of action against the same defendant parties in a subsequent suit brought by him through his next friend—his father.<sup>195</sup> The court in *Halatyn* distinguished *Brake* by finding that in *Halatyn* the minor initially suing in his own name, and subsequently by his titular next friend, were the same and sole party in interest, while in *Brake* the parties plaintiff were different and sued on different rights.<sup>196</sup> Therefore, in *Halatyn*, the minor, having taken one nonsuit of right as to the same causes of action, and

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189. On file with author.

190. On file with author.

191. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013).

192. *Id.*

193. *Id.*

194. See 268 Va. 92, 97–100, 597 S.E.2d 59, 62–63 (2004).

195. *Halatyn v. Miller*, 69 Va. Cir. 236, 236 (2005) (Fairfax County).

196. *Id.* at 241; *Brake*, 268 Va. at 100, 597 S.E.2d at 63.

against the same defendant parties, was precluded under section 8.01-380(B) from a second nonsuit of right.<sup>197</sup>

The requirement for leave of court before an additional nonsuit may be granted was emphasized in *Houben v. Duncan*, where the court denied the plaintiff a second nonsuit when the plaintiff not only did not obtain leave of the court therefor, but never notified the court that a second nonsuit was being requested.<sup>198</sup>

As previously discussed in the lead to Part V of this article, *Waterman v. Halverson* and *McManama v. Plunk* in the court rejected the contention that an unserved defendant's lack of notice and an opportunity to be heard barred the plaintiff from obtaining a first nonsuit.<sup>199</sup> That is still the rule, but it does not apply to additional nonsuits. Prior to the 2007 amendment to section 8.01-380(B), permitting the court to allow additional nonsuits "upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel,"<sup>200</sup> the Supreme Court of Virginia, in *Janvier v. Arminio*, held that a plaintiff could take an additional nonsuit without notification to the defendant(s).<sup>201</sup> That portion of *Arminio* no longer represents the law. Current section 8.01-380(B) controls the issue, and reasonable notice is now required for all additional nonsuits.

Section 8.01-380(B) does not include language requiring "good cause" for an additional nonsuit, or specifically permitting the trial court to impose a good cause requirement for an additional nonsuit. Nevertheless, the circuit courts have expressed different views as to whether good cause is required for a second or additional nonsuit. One circuit court has denied a plaintiff's request

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197. *Halatyn*, 69 Va. Cir. at 241–42.

198. 58 Va. Cir. 391, 391–92 (2002) (Fairfax County). The second nonsuit was initially processed as a routine daily order of the court pursuant to a proposed nonsuit order, faxed to the court by the plaintiff without notice to the defendants of either the nonsuit or of the motion for judgment. *Id.*

199. *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001); *McManama v. Plunk*, 250 Va. 27, 29–30, 35, 458 S.E.2d 759, 760, 763–64 (1995); see also *Janvier v. Arminio*, 272 Va. 353, 365, 634 S.E.2d 754, 760 (2006); *Clark v. Butler Aviation-Washington Nat'l, Inc.*, 238 Va. 506, 511–12, 385 S.E.2d 847, 849–50 (1989).

200. See VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013) (emphasis added).

201. *Janvier*, 272 Va. at 367, 634 S.E.2d at 761. However, prior to *Janvier* some circuit courts and one commentator took the position that notice to all defendants was required prior to an additional nonsuit. See, e.g., *Houben*, 58 Va. Cir. at 392; *Hicks v. Harrison*, 35 Va. Cir. 219, 224 (1994) (Spotsylvania County); W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 11.05[2](A)–(B) (4th ed. 2005).

for a second nonsuit because the plaintiff made no showing of any sufficient basis to allow another nonsuit, other than “to avoid the unpleasant possibility of the court’s dismissing the case under the provisions of Rule 4:12.”<sup>202</sup>

Another circuit court denied an additional nonsuit for lack of good cause. In *Nichols v. Moss*, the personal injury case was first nonsuited seventeen months after filing, without service on the defendant.<sup>203</sup> The plaintiff refiled the action and sought an additional nonsuit some nineteen months later, after the trial court found attempted service on the defendant to be ineffective.<sup>204</sup> The additional nonsuit was denied on the basis of the plaintiff’s lack of diligence in pursuing her claim.<sup>205</sup>

*Nichols*, *Winfree*, and *Hernandez* are consistent with the premise that allowance of a subsequent nonsuit is within the discretion of the trial court.<sup>206</sup> This tracks the statutory language of section 8.01-380(B), that only one nonsuit may be taken as a matter of right, “although the court *may allow* additional nonsuits,” and that “[t]he court, *in the event* additional nonsuits *are allowed* may assess costs and reasonable attorney fees against the non-suiting party.”<sup>207</sup> The phrases “may allow,” “in the event,” and “are allowed” clearly reflect the intent of the General Assembly that, unlike a first nonsuit of right, whether to “allow” an additional nonsuit is within the discretion of the trial court.<sup>208</sup> It is,

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202. *Winfree v. Richmond Mem. Hosp.*, 3 Va. Cir. 387, 389 (1985) (City of Richmond).

203. 73 Va. Cir. 259, 259 (2007) (Norfolk County).

204. *Id.* at 259–60.

205. *Id.* at 260; *see also Hernandez v. Awld*, 73 Va. Cir. 497, 499 (2007) (Loudoun County) (denying an additional nonsuit in a personal injury case when trial after a second nonsuit would be close to seven years after the accident, and would be in contravention of the defendant’s right to have a claim against her resolved as expeditiously as the law allows).

206. *See Long v. Mountain Trust Bank*, 11 Va. Cir. 463, 464 (1978) (City of Roanoke). (“[T]he granting of a second nonsuit is a matter within the court’s discretion.”); *Chatman v. Nowell’s Auto & Truck Repair*, 37 Va. Cir. 232, 232 (1995) (Prince William County).

207. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013) (emphasis added).

208. The statutory phrase that the court “may allow” additional nonsuits connotes the exercise of judicial discretion, especially in the context of the premise that the first nonsuit is “a matter of right.” *See Specialty Hospitals of Wash., LLC v. Rappahannock Goodwill Indus., Inc.*, 283 Va. 348, 353–54, 722 S.E.2d 557, 559 (2012) (citing *Harper v. Va. Dep’t. of Taxation*, 250 Va. 184, 194, 462 S.E.2d 892, 898 (1995)) (holding “that the word ‘may’ is *prima facie* permissive, importing discretion.”); *AME Fin. Corp. v. Kiritsis*, 281 Va. 384, 390, 707 S.E.2d 820, 824 (2011) (stating that the word “may” evidences that a trial court has discretion); *Smith v. Commonwealth*, 59 Va. App. 710, 720, 722 S.E.2d 310, 314 (2012) (recognizing “the use of the permissive ‘may’”); *TM Delmarva Power, L.L.C. v. NCP of Va.*,

therefore, appropriate that the exercise of that discretion be informed by the standard or requirement of good cause.<sup>209</sup> Moreover, as discussed in Part XI of this article, in connection with voluntary dismissal in federal court under Federal Rule of Civil Procedure 41(a)(2), where court approval is required for a voluntary dismissal “on terms that the court considers proper,” some federal courts have imposed a requirement that the plaintiff provide a sufficient explanation of the need for a voluntary dismissal.<sup>210</sup> The “good cause” sought by some Virginia courts for approval of an additional nonsuit appears to parallel the “sufficient explanation” inquiry of some federal courts for judicial approval of a voluntary dismissal.<sup>211</sup>

On the other hand, the City of Norfolk Circuit Court has held that section 8.01-380 does not require the plaintiff to set forth any legitimate basis for an additional nonsuit. It construed the statute as granting trial courts the discretion to permit additional nonsuits without requiring good cause therefor.<sup>212</sup>

If the Supreme Court of Virginia should decide that good cause for an additional nonsuit were required, an example thereof is found in *Long v. Mountain Trust Bank*, where the plaintiff expressed a desire to nonsuit his Virginia action to pursue the same

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L.L.C., 263 Va. 116, 121, 557 S.E.2d 199, 201 (2002) (“[M]ay’ is primarily permissive in effect,” although courts “will construe ‘may’ and ‘shall’ as permissive or mandatory in accordance with the subject matter and context”) (quoting *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E.2d 191, 193 (1912)).

209. See *Fletcher v. Inova Health Care Servs.*, 71 Va. Cir. 331, 332 (2006) (Fairfax County) (holding that even though “good cause” is not explicitly contained in Rule 1:9, “good cause is certainly a factor in deciding whether to exercise the Court’s discretion”). For other decisions equating good cause with judicial discretion, see, e.g., *AME Fin. Corp.*, 281 Va. at 392–93, 707 S.E.2d at 824, *Booth v. Broudy*, 235 Va. 457, 459, 369 S.E.2d 165, 166 (1988) (The absence of good cause eliminates the basis for the exercise of judicial discretion.), and *Henderson v. Commonwealth*, 59 Va. App. 641, 648, 722 S.E.2d 275, 279 (2012).

210. See, e.g., *Williams v. Brumbaugh*, No. 3:10-cv-700, 2011 U.S. Dist. LEXIS 55627, at \*6 (E.D. Va. May 24, 2011) (citing *Howard v. Inova Health Care Servs.*, 302 Fed. App’x 166, 178–79 (4th Cir. 2008)).

211. See, e.g., *Pavlucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987) (citing *Pace v. S. Express Co.*, 409 F.2d 331, 334, (7th Cir. 1969) (holding that in deciding whether to permit voluntary dismissal in a Rule 41(a)(2) motion, the court should consider, inter alia, “in sufficient explanation of the need to take a dismissal.”).

212. *Dixon v. Messer*, 56 Va. Cir. 366, 366–67 (2001) (City of Norfolk) (holding that it is “well within [the court’s] discretion to grant a second nonsuit” without engaging in any analysis of good cause and despite defendant’s arguments that plaintiff had offered no ground for requesting the second nonsuit).

litigation matter in federal court.<sup>213</sup> The *Long* court noted: “If one suit (the federal action) can resolve all issues, including allegations not cognizant by this court (i.e., antitrust issues), this constitutes good cause for granting a nonsuit, provided the defendants’ rights are not prejudiced thereby.”<sup>214</sup>

The second sentence of section 8.01-380(B) contains an additional provision for the exercise of judicial discretion. In the event the trial court allows an additional nonsuit, it “may assess costs and reasonable attorney fees against the nonsuiting party.”<sup>215</sup> No further judicial discretion is authorized in the statute, beyond costs and reasonable attorney’s fees. Therefore, application of the doctrine of *expressio unius est exclusio alterius*<sup>216</sup> would prohibit the court from the assessment of any additional economic requirements for the grant of an additional nonsuit.<sup>217</sup> Nevertheless, some courts have undertaken to condition the entry of an order for an additional nonsuit upon terms and conditions not prescribed in section 8.01-380(B).<sup>218</sup>

Since a plaintiff may be ordered to pay attorney’s fees as a condition of entry of a second nonsuit, failure to comply with that order risks having no protection under section 8.01-229(E)(3).<sup>219</sup>

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213. 11 Va. Cir. 463, 465 (1978) (*City of Roanoke*).

214. *Id.*

215. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013).

216. BLACK’S LAW DICTIONARY 581 (6th ed. 1990) (meaning the expression of one thing to the exclusion of all others not enumerated).

217. See *Albright v. Burke & Herbert Bank & Trust Co.*, 249 Va. 463, 467–68, 457 S.E.2d 776, 778–79 (1995) (stating that Virginia Code section 8.01-380(B) does not give the court the right to condition the filing of an amended motion for judgment upon the payment of the opposing party’s attorney’s fees incurred in the defense of the plaintiff’s similar action which was nonsuited in an earlier proceeding). The Supreme Court of Virginia has consistently and approvingly applied the doctrine of *expressio unius est exclusio alterius*. See, e.g., *Campbell Cnty. v. Royal*, 283 Va. 4, 30, 720 S.E.2d 90, 103 (2012) (“The maxim *expressio unius est exclusio alterius* applies when mention of a specific item in a statute implies that omitted items were not intended to be included.”) (quoting *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 468–69, 698 S.E.2d 900, 902 (2010)); *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 468–69, 698 S.E.2d 900, 902 (2010) (“[T]he question . . . is not what the legislature intended to enact, but what is the meaning of that which it did enact.”); *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938) (“The maxim ‘*Expressio unius est exclusio alterius*’ is especially applicable in the construction and interpretation of statutes.”); see also *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

218. See e.g., *Long*, 11 Va. Cir. at 464, 466.

219. See *Cunningham v. Fairfax Ice Arena, Inc.*, 61 F.3d 899, 899 (4th Cir. 1995) (unpublished table decision) (full text available in Westlaw, No. 94-2524, 1995 WL 444831 (4th Cir. July 28, 1995)). The plaintiff’s failure to comply with the circuit court’s order

The circuit court's authorized assessment of attorney's fees and costs as a predicate to the allowance of a second nonsuit is conditioned upon the nonsuit being, in fact, an additional nonsuit.<sup>220</sup>

The portion of section 8.01-380(B) which permits the assessment of attorney's fees and costs as a predicate to the allowance of additional nonsuits limits that assessment to the action being nonsuited, and does not permit such assessment in a subsequent action.<sup>221</sup> Nor does section 8.01-380(B) give the court the right to condition the filing of an amended motion for judgment upon the payment of the attorney's fees incurred by the defendant in defending the plaintiff's prior nonsuited action.<sup>222</sup>

Where a nonsuit is appealed from general district court to circuit court, the issue of whether a nonsuit subsequently taken in circuit court would be an additional nonsuit is discussed in Part VI of this article. Section 8.01-380(B) is also discussed subsequently, in Part VIII of this article, in connection with the extent to which a nonsuit is an "absolute" right.

1. Subsequent Nonsuit After Dismissal, Dismissal Without Prejudice, Discontinuance, Withdrawal of Action, or Voluntary Dismissal Under Federal Rule of Civil Procedure 41(a)

An advantage of a nonsuit—unlike a retraxit, an "agreed" dismissal, or a dismissal with prejudice—is that it is not a determination on the merits, and does not bar a further action for the same cause.<sup>223</sup> "Mere" dismissals, dismissals without prejudice, discontinuances, withdrawal of actions, or voluntary dismissals

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conditioning her nonsuit on the payment of \$1500 to defense counsel before refiling her nonsuit action caused the refiling of her action in federal court to be unprotected by the tolling provisions of Virginia Code section 8.01-229(E)(3). *Id.*

220. See *City of Suffolk v. Lummis Gin Co.*, 278 Va. 270, 275–77, 683 S.E.2d 549, 552–53 (2009) (reversing the circuit court's determination that the plaintiff had taken a second nonsuit, thereby permitting the award of attorney's fees and costs, where the first nonsuit was not of the same cause of action as that subsequently nonsuited); see also *Brake v. Payne*, 268 Va. 92, 100–01, 597 S.E. 59, 63–64 (2004) (finding that where the first nonsuited action was a nullity, having been obtained by a plaintiff who lacked standing to bring it, the "second nonsuit" of the action was, in fact, a first nonsuit of right).

221. *Albright*, 249 Va. at 468, 457 S.E.2d at 779.

222. *Id.*

223. *Virginia Concrete Co. v. Bd. of Supervisors*, 197 Va. 821, 825–26, 91 S.E.2d 415, 418–19 (1956); *Thomas Gemmill, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 97, 184 S.E. 457, 458 (1936).

under Federal Rule of Civil Procedure 41(a), may be considered the functional equivalents of a nonsuit for certain purposes because they have that same advantage.<sup>224</sup> Those purposes do not, however, fall within the scope of section 8.01-229(E)(3).

While not the functional equivalents of a nonsuit for purposes of section 8.01-229(E)(3)—a matter discussed in Part V.E.3 of this article—the foregoing raise the issue of whether any or all those purposes may cause a subsequent nonsuit to be designated an additional nonsuit under section 8.01-380(B).

There is a reasoned circuit court decision specifically resolving the foregoing issue with a negative conclusion.<sup>225</sup> *Joseph v. Giant Food, Inc.*, citing *McManama v. Plunk*, distinguished between dismissals without prejudice and nonsuits,<sup>226</sup> and held that a nonsuit in circuit court is a first nonsuit of right after an appeal from

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224. See *Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 343–44, 732 S.E.2d 703, 707 (2012) (equating nonsuit and dismissal without prejudice, citing the intent of the General Assembly in adopting the 1954 amendment to the nonsuit statute); see also *Delaney v. Marsh*, No. 7:08-cv-00465, 2010 U.S. Dist. LEXIS 132266, at \*5 (W.D. Va., March 25, 2010) (a successful withdrawal of an action filed in a Virginia general district court and refiled in federal court was, in effect, a nonsuit, where there was no indication that the general district court considered the merits of the matter, or adjudged it on the merits, or that the matter was concluded with prejudice); *Umpheyville v. Gittins*, No. 5:07 CV 00096, 2009 WL 86484, at \*2 (W.D. Va., Jan. 6, 2009); *Moore v. Moore*, 218 Va. 790, 795 n.4, 240 S.E.2d 535, 538 n.4 (1978); *Virginia Concrete Co.*, 197 Va. at 825, 91 S.E.2d at 419 (a dismissal without prejudice stands on the same footing as a nonsuit and does not bar further litigation on the same cause of action); *Norwood v. Buffey*, 196 Va. 1051, 1054–55, 86 S.E.2d 809, 810–11 (1955); *Payne v. Buena Vista Extract Co.*, 124 Va. 296, 311, 98 S.E. 34, 39–40 (1919) (“A discontinuance is in effect a nonsuit.”); *Hoover v. Mitchell*, 66 Va. (25 Gratt.) 387, 387 (1874); *Poullath v. Rzasa*, 75 Va. Cir. 349, 352, (2008) (Fairfax County). But see *Cogar v. Barrett*, 280 Va. 627, 633 n.5, 702 S.E.2d 117, 120 n.5 (2010) (noting that nonsuit is not an abatement or dismissal pursuant to Virginia Code section 8.01-244(B), and if any wrongful death action is brought within two years of the decedent’s death and abates or is dismissed without reaching the merits, then the time it was pending does not count as part of the two-year period). *Virginia Concrete*, in discussing *Taylor*, noted that much may depend on the stage of the proceedings at which an order of voluntary dismissal is entered, and the reason for its entry. *Virginia Concrete Co.*, 197 Va. at 826 n.1, 91 S.E.2d at 419 n.1. Accordingly, *Virginia Concrete* recommended that, to avoid a future plea of res judicata, when a plaintiff voluntarily dismisses his suit, the order should recite that the dismissal is “without prejudice to plaintiff’s right to institute further suits concerning the same matter as he may be advised.” *Id.*

225. See *Joseph v. Giant Food, Inc.*, 61 Va. Cir. 143, 147 (2003) (Fairfax County) (“[I]f the General Assembly had intended for a dismissal without prejudice to bar a plaintiff from subsequently seeking a nonsuit as a matter of right, the language of the statute would have reflected this intent . . . . In fact, a dismissal without prejudice is distinct from a nonsuit.”).

226. *Id.* at 148 (citing *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 761–62 (1995) (“[T]he trial court erred in ruling that the nonsuit order had ‘the limited effect of being a dismissal order without determining the merits.’”).

a general district court action has been dismissed without prejudice.<sup>227</sup>

In addition, a recent decision of the Supreme Court of Virginia could foreshadow the court's concurrence with *Joseph*. In *Inova Health Care Services v. Kebaish*, the court was concerned with the effect of a voluntary dismissal without prejudice taken in federal court, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), on a subsequent nonsuit of the same cause of action in Virginia circuit court.<sup>228</sup> The court acknowledged that in *Welding, Inc. v. Bland Co. Service Authority*, it had referred in dictum to the fact that federal practice recognizes procedures "which are substantially equivalent to Virginia's nonsuit."<sup>229</sup> However, the court noted that the term "nonsuit identifies a specific practice used in Virginia civil procedure,"<sup>230</sup> and held that "[a] nonsuit is only the functional equivalent to a voluntary dismissal to the extent that both provide a plaintiff with a method to voluntarily dismiss the suit up until a specified time in the proceeding."<sup>231</sup> Accordingly, the Supreme Court of Virginia found no error where the Fairfax County Circuit Court permitted the plaintiff to take a first nonsuit of right after his prior voluntary dismissal of his action in the Eastern District of Virginia, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).<sup>232</sup>

Whether *Kebaish* will, in future decisions, be limited to its facts, or whether it will control the situation in which a plaintiff, suing in a Virginia circuit court, obtains a voluntary dismissal of his action without prejudice, or a discontinuance, or voluntarily withdraws his action, and subsequently refiles the same cause of action in the circuit court, must await future judicial development.

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227. *Id.*

228. 284 Va. at 342–46, 732 S.E.2d at 706–08.

229. *Id.* at 342, 732 S.E.2d at 706 (citing *Welding, Inc. v. Bland Cty. Serv. Auth.*, 261 Va. 218, 224, 541 S.E.2d 909, 912 (2001)); accord *Scoggins v. Douglas*, 760 F.2d 535, 538 (4th Cir. 1985); *Yarber v. Allstate Ins. Co.*, 674 F.2d 232, 236–37 (4th Cir. 1982); *Sherman v. Hercules*, 636 F. Supp. 305, 309 nn.5–6 (W.D. Va. 1986); *Ambrose Branch Coal Co., Inc. v. Tankersley*, 106 B.R. 462, 466–67 (W.D. Va. 1989); *Smith v. Sparshott*, No. CL 2006-3261, 2006 Va. Cir. LEXIS 133 (Va. Cir. Ct. July 18, 2006) (Fairfax County); see also *Jacobs v. Marks*, 182 U.S. 583, 594–95 (1901).

230. *Inova Health Care Servs.*, 284 Va. at 346, 732 S.E.2d at 708 (quoting *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 223–24, 541 S.E.2d 909, 912 (2001)).

231. *Id.*

232. *Id.*

C. *Virginia Code Section 8.01-380(C): Filing Notice of Nonsuit Within Seven Days of Trial or During Trial*

As previously noted in the general discussion of the historical background of nonsuit in Virginia, H.B. 2722, enacted on April 4, 2001, and redesignating former section 8.01-380(C) as current section 8.01-380(D), provided that if notice to take a nonsuit of right was given to the opposing party “within five days of trial,” the court had the discretion to assess against the nonsuiting party reasonable witness fees and travel costs of expert witnesses “scheduled to appear at trial,” which were actually incurred by the opposing party solely by reason of the failure to give notice at least five days prior trial.<sup>233</sup> The court was authorized to determine the “reasonableness” of such expert witness fees and travel costs.<sup>234</sup> The 2004 General Assembly changed that prior five-day notice period to a seven-day notice period, but otherwise left the 2001 version of section 8.01-380(C) intact.<sup>235</sup> The 2013 General Assembly’s amendment to section 8.01-380(C) preserved the “within seven days of trial” period, but added “or during trial” immediately thereafter.<sup>236</sup> It also prescribed that invoices, receipts, or confirmation of payment shall be admissible to prove the reasonableness of expert witness fees and travel costs.<sup>237</sup> Sec-

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233. Act of Apr. 4, 2001, ch. 825, 2001 Va. Acts 1149, 1149 (codified as amended VA. CODE ANN. § 8.01-380) (Cum. Supp. 2001)). As originally introduced by Delegate V. Earl Dickinson (D-Mineral), H.B. 2722 would have required a nonsuit to be taken at least thirty days prior to trial; permitted the court to assess costs and reasonable attorney’s fees against a nonsuiting party whenever a nonsuit was taken; and mandated the assessment of costs and reasonable attorney’s fees against the nonsuiting party in the event additional nonsuits were allowed “if the nonsuiting party does not prevail.” H.B. 2722, Va. Gen. Assembly (Reg. Sess. 2001) (offered Jan. 18, 2001). The House Committee on Courts of Justice of the 2000 General Assembly rejected H.B. 844, introduced by Delegate William J. Howell (R-Stafford), which would have mandated the assessment of costs and reasonable attorney’s fees against the nonsuiting party whenever a nonsuit was taken within the fifteen-day period prior to trial. *H.B. 844 Dismissal of action by nonsuit*, VA. LEGIS. INFO. SYS. (Feb. 13, 2000), <http://leg1.state.va.us/cgi-bin/legp524.exe?ses=0018ttypsbil&val=hb844>.

234. Ch. 825, 2001 Va. Acts at 1149 (codified as amended at VA. CODE ANN. § 8.01-380(C) (Repl. Vol. 2000 & Cum. Supp. 2001)).

235. Act of Apr. 8, 2004, ch. 362, 2004 Va. Acts 495, 495 (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2004)).

236. Act of Mar. 13, 2013, ch. 274, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)); Act of Mar. 14, 2013, ch. 366, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)).

237. Ch. 274, 2013 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)); Ch. 366, 2013 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)).

tion 8.01-380(C), as so amended, presents a number of interpretative issues, some of which may require subsequent resolution by the courts.

First of all, section 8.01-380(C) is, on its face, limited to a nonsuit “of right,” which, under section 8.01-380(B), is only the first nonsuit of a party to a cause of action against the same party to a proceeding.<sup>238</sup> Accordingly, section 8.01-380(C) is not applicable in the case of additional nonsuits under section 8.01-380(B), which are permitted by the court or stipulated to by counsel, as to which the court may “assess costs and reasonable attorney fees against the nonsuiting party.”<sup>239</sup> This conclusion is buttressed by the exclusion from taxable court costs of expert witness fees.<sup>240</sup>

Section 8.01-380(C) may have a somewhat limited application, inasmuch as it applies only to cases in which the opposing party actually schedules expert witnesses to appear at trial. That is not a circumstance occurring in all trials. Indeed, the authors of an article on expert testimony in federal civil trials have noted that “[o]ur data do not permit an insight into the absolute frequency of expert testimony in civil trials, since we have no estimate of the number of trials involving no expert testimony.”<sup>241</sup> However, the same article noted that tort cases, primarily personal injury or medical practice cases, were the most frequent types of trials involving experts, yet tort cases constituted only twenty-six percent of all civil trials, and experts were employed in only forty-five percent of such cases.<sup>242</sup> Experts were employed in only eleven percent of contract cases, which constituted fourteen percent of all civil trials.<sup>243</sup>

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238. See VA. CODE ANN. § 8.01-380(B)–(C) (Cum. Supp. 2013). Section 8.01-380(C) as used hereinafter, unless otherwise indicated, means Code of Virginia section 8.01-380(C) as amended in the 2013 General Assembly by H.B. 1709 and S.B. 903.

239. Compare VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013), with *id.* § 8.01-380(B) (Cum. Supp. 2013).

240. See *Holmes v. LG Marion Corp.*, 258 Va. 473, 482, 521 S.E.2d 528, 534 (1999) (noting that expert witness fees are not recoverable under the rubric of “court costs”); *Coady v. Strategic Res., Inc.*, 258 Va. 12, 16, 515 S.E.2d 273, 275 (1999) (quoting *United States v. One Bally Golden Gate*, 225 F. Supp. 552, 554 (W.D. Va. 1964) (noting the general principle of Anglo-Saxon jurisprudence that expert witness fees are not chargeable to the loser)).

241. MOLLY TREADWAY JOHNSON ET AL., EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 7 (2000).

242. *Id.* at 1–2.

243. *Id.*

Section 8.01-380(C) also may have a somewhat limited application because its penalties may be avoided altogether by giving the opposing party notice of the intent to take a nonsuit at least seven days prior to trial and, in any event, it does not apply unless the opposing party has “actually incurred” expert travel costs and witness fees, a circumstance not likely to occur in every litigation in which expert witnesses are “scheduled to appear at trial.”<sup>244</sup> Even when expert testimony may be anticipated, expert travel costs and witness fees may not have been “actually incurred” if the expert has not traveled to the place of trial in expectation of giving testimony.<sup>245</sup>

The potentially limited application of section 8.01-380(C) is further buttressed by the observation that most plaintiffs who nonsuit prior to trial do so because they recognize that they are insufficiently prepared to go to trial on a certain date, that the original allegations of the complaint can no longer be successfully pursued, they decide to refile—either in federal court or in a jurisdiction with a more favorable statute of limitations—or they decide to nonsuit their equitable claims and refile upon issues triable by a jury, in order to obtain a jury trial (a practice that does not appear to be affected by current Supreme Court of Virginia Rules 3:21 or 3:22). Plaintiffs in such circumstances will likely nonsuit well before the seven-day window closes.

The pre-2013 version of section 8.01-380(C) applied only to pre-trial procedures.<sup>246</sup> Once the trial had commenced, former section 8.01-380(C) had no applicability.<sup>247</sup> If a first nonsuit were taken at trial with no advance notice to the opposing party, the former statute provided the court with no discretion to assess against the nonsuiting party reasonable witness fees and travel costs of the defendant’s expert witnesses, even if the expert witnesses appeared and testified at trial.<sup>248</sup> However, as section 8.01-380(C)

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244. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

245. *See id.*

246. *See* Act of Mar. 13, 2013, ch. 274, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)); Act of Mar. 14, 2013, ch. 366, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)) (adding “or during trial”).

247. VA. CODE ANN. § 8.01-380 (Repl. Vol. 2007).

248. *See* *Wiles v. Instrumentation and Control Sys. Eng’g, Inc.*, No. CLID-2577, slip. op. at 3 (Va. Cir. Ct. Feb. 15, 2012) (City of Richmond) (“This statute evinces no intent to have plaintiff answer for a defendant’s witness expenses if the right of a first nonsuit, as here, is exercised during trial.”).

was amended by the 2013 General Assembly, *Wiles* no longer applies.<sup>249</sup> A failure to give the required notice at least seven days prior to trial will now trigger judicial discretion to apply section 8.01-380(C)'s penalty when a nonsuit is taken at trial.<sup>250</sup>

Other new language added to section 8.01-380(C) by the 2013 amendment raises an interpretive issue that appears to require judicial resolution. That issue is the effect of invoices, receipts, or confirmations of payment of witness fees and travel costs which have been incurred by the opposing party. The burden of proving the reasonableness of such fees and costs is presumptively upon the party requesting them, and the 2013 amendment to section 8.01-380(C) was clearly designed to lighten that burden.<sup>251</sup> However, the language used to attempt to do so is less than clear.<sup>252</sup> The intent of that language appears to have been to permit the invoices, receipts, or confirmations of payment to be admissible to support the *reasonableness of the requested witness fees and travel costs* without the necessity to offer testimony therefor.<sup>253</sup> Unfortunately, the language employed states that these documents may be admissible "to prove reasonableness without the need to offer testimony to support the authenticity or *reasonableness of such documents*."<sup>254</sup> Whatever the "reasonableness of such documents" means, it is not the equivalent of the reasonableness of the requested witness fees and travel costs.<sup>255</sup>

The newly added language to section 8.01-380(C) is not alone in raising questions as to the interpretation of the section. Some of the former language does the same. Most of the language of the first sentence to section 8.01-380(C) was not affected by the 2013 amendment and has been in effect since the 2001 amendment.<sup>256</sup> Nevertheless, despite the twelve years since its adoption, there are issues with that language which have apparently not yet been

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249. Ch. 274, 2013 Va. Acts at \_\_\_ (codified as amended a VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)); Ch. 366, 2013 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013)).

250. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

251. *See id.*

252. *See id.*

253. *Id.*

254. *See id.* (emphasis added).

255. *See id.*

256. *Id.*; Act of Apr. 4, 2001, ch. 825, 2001 Va. Acts 1149, 1149 (codified as amended at VA. CODE ANN. § 8.01-380 (Repl. Vol. 2000 & Cum. Supp. 2001)).

the subject of judicial concern. Some examples of these issues are as follows:

(1) The phrase “scheduled to appear at trial” is unclear.<sup>257</sup> Does it extend to any expert identified under Supreme Court of Virginia Rule 4:1(b)(4)(A)(i), or must the expert appear on the list of the opposing party’s witnesses exchanged with the nonsuiting party prior to trial pursuant to Supreme Court of Virginia Rule 3.V?

(2) The “notice” requirement of section 8.01-380(C) raises several interesting issues. First of all, the prescribed notice is notice to the opposing party, not to the trial court.<sup>258</sup> This is interesting because a plaintiff is entitled to a first nonsuit of right regardless of a failure to give notice to the opposing party.<sup>259</sup> Section 8.01-380(C) does not change this. It merely provides a discretionary penalty when such notice is not given within seven days of trial and a nonsuit of right is subsequently taken.<sup>260</sup> Further, section 8.01-380(C) does not prescribe what constitutes the required notice. At some point the courts will have to determine the legal sufficiency of “notices” such as any of the following: “Plaintiff intends to take a nonsuit;” or “plaintiff will take a nonsuit;” or “plaintiff is likely to take a nonsuit;” and so on. Another notice issue is whether the prescribed penalty is barred where the plaintiff, in good faith,<sup>261</sup> timely provides the opposing party with the prescribed notice but, with or without informing the opposing party that the pretrial notice is withdrawn, does not take a nonsuit of right until late in the trial, after the opposing party’s expert witness have testified.<sup>262</sup>

(3) The requirement that any expert witness fees and travel costs must have been “actually incurred”—not merely billed or quoted by the opposing party—“*solely* by reason of the failure to

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257. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

258. *Id.*

259. *See* *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995).

260. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

261. “Good faith” is an understood requirement of the giving of any notice under Virginia Code section 8.01-380(C). *See* VA. SUP. CT. R. pt. 6, § II, R. 4.1 (Repl. Vol. 2013) (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law.”).

262. A nonsuit is not obtained by notice to the opposing party. It requires notification to the trial court of the request for nonsuit, ordinarily by motion, and the unsuspending entry of an order of nonsuit by the trial court. Until the entry of that order, the action is not nonsuited. *See* *Bowie v. Murphy*, 271 Va. 127, 132 n.5, 624 S.E.2d 74, 78 n.5 (2008); *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1989).

give notice at least seven days prior to trial,” raises other issues.<sup>263</sup> The word “solely” places a significant burden on the opposing party, who clearly has the burden of proof on this issue.

A party may “actually incur” expert witness fees and travel costs of his “scheduled” expert who does not testify for a variety of reasons not “solely” due to a plaintiff’s failure to comply with the timely notice requirements of section 8.01-380(C). For example, an expert witness who has already traveled to the place of trial may be prevented from testifying as the result of a grant of a motion in limine or the sustaining of a demurrer to the cause of action to which he was scheduled to testify. Further, trial courts not infrequently find proffered expert witnesses unqualified to testify, or subsequently exclude, or later strike, that testimony for a variety of reasons, for example, unreliability, repetitive or cumulative testimony, or not assisting the trier of fact.<sup>264</sup> Finally, there is the issue of what amount, if any, of “actually incurred” expert witness fees and costs could be assessed by the court if the required notice was not timely given, but the court permitted the expert to testify as to only a portion of his “scheduled” testimony, but the opposing party incurred the entirety of the apportioned expert’s fees and costs.<sup>265</sup>

(4) The language of the first sentence to section 8.01-380(C) creates another potential interpretation issue. The initial portion of the sentence provides as the trigger for the discretionary penalty when “notice to take a nonsuit of right *is given* . . . within seven days of trial.”<sup>266</sup> However, the latter portion of the sentence provides for a discretionary penalty when a party “*fail[s] to give* notice at least seven days “prior to trial.”<sup>267</sup> The initial portion of the sentence could be considered to be redundant, but in interpreting statutes courts may neither rewrite statutory languages, nor ren-

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263. VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013) (emphasis added).

264. See, e.g., *Mohlmann v. Republic Servs. of Va. LLC*, 81 Va. Cir. 293, 297 (2010) (Fairfax County) (rejecting the application of Virginia Code section 8.01-380(C) because the defendant’s third-party claim precluded the plaintiff from obtaining a nonsuit prior to trial). While Virginia courts have not yet chosen to adopt the principles of *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589 & n.7 (1993), and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999), the trial court has wide discretion to determine whether expert testimony is inherently unreliable. See *John v. Im*, 263 Va. 315, 316, 559 S.E.2d 694, 697–98 (2002); *Spencer v. Commonwealth*, 240 Va. 78, 98, 393 S.E.2d 609, 621 (1990).

265. See VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

266. See *id.* (emphasis added).

267. See *id.* (emphasis added).

der any words meaningless, but must interpret the statute to harmonize all of its language.<sup>268</sup>

*D. Code of Virginia Section 8.01-380(D): Effect of a Filed Counterclaim, Cross-Claim, or Third-Party Claim*

The final statutory limitation on the right to nonsuit is stated in section 8.01-380(D), prohibiting nonsuit without the consent of the adverse party when the latter has filed a counterclaim, cross-claim, or third-party claim arising out of the same transaction or occurrence as the claim of the party seeking nonsuit, unless the counterclaim, cross-claim, or third-party claim can remain pending for independent adjudication by the court.<sup>269</sup> This means that “in most circumstances where the counterclaim, cross-claim or third-party claim to be left pending after a nonsuit involves the same transaction as that pled in the plaintiff’s pleading, the nonsuit will not be permitted.”<sup>270</sup>

The bar to nonsuit under section 8.01-380(D) cannot be removed by plaintiff’s bare assertion that the pending counterclaim should be stricken because it was not filed in good faith and was a maneuver to prevent the plaintiff from taking a nonsuit.<sup>271</sup> Where the counterclaim is not facially specious or in bad faith, it will not be considered a nullity and stricken.<sup>272</sup>

In order to bar a nonsuit, dependent (non-independent) counterclaims, cross-claims and third-party claims must be pending at the time the plaintiff moves to nonsuit his action. Cross-petitions filed after a motion for nonsuit are not legitimate grounds for denial of a nonsuit under section 8.01-380(D).<sup>273</sup> Further, to bar a

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268. See *Gilliam v. McGrady*, 279 Va. 703, 709, 691 S.E.2d 797, 800 (2010); *Corns v. School Bd. of Russell Cnty.*, 249 Va. 343, 349, 454 S.E.2d 728, 732 (1995); *Lamb v. Commonwealth*, No. 0710-12-3, 2013 Va. App. LEXIS 40, at \*4 (Va. Ct. App. Feb. 5, 2013).

269. See VA. CODE ANN. § 8.01-380(D) (Cum. Supp. 2013); *Clark v. Clark*, 11 Va. App. 286, 297, 398 S.E.2d 82, 88 (1990) (citing *Wells v. Lorcom House Condo. Council of Co-Owners*, 237 Va. 247, 251, 377 S.E.2d 381, 383 (1989)).

270. *Jay-Ton Const. Co. v. Bowen Const. Servs., Inc.*, 62 Va. Cir. 414, 424 (2003) (City of Portsmouth) (citing KENT SINCLAIR & LEIGH MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE § 13.2, at 571 (3d ed. 1998)).

271. *Hitt v. McGowan*, 47 Va. Cir. 300, 301 (1998) (Spotsylvania County).

272. *Id.* at 302.

273. *Sharman v. Gillepsie*, No. 0140-09-2, 2010 Va. App. LEXIS 47, at \*11–12 (Va. Ct. App. Feb. 9, 2010).

nonsuit a cross-petition must have been actually filed.<sup>274</sup> The mere intent of a litigant to assert a claim in the nature of a counterclaim is not sufficient to bar a plaintiff's right to nonsuit when no such counterclaim or cross-petition has actually been filed.<sup>275</sup>

The bar of section 8.01-380(D) is broad. Even if some counts are independent, the presence of at least one count of a counterclaim, cross-claim or third-party claim that cannot be independently adjudicated makes the entire counterclaim, cross-claim, or third-party claim incapable of independent adjudication.<sup>276</sup> There is a split of authority on whether, when there are two defendants, only one of which has filed a dependent counterclaim, both the counterclaiming defendant and the non-counterclaiming defendant are protected against a nonsuit.<sup>277</sup>

Competing claims that cannot be independently adjudicated do not always bar a nonsuit. Where the parties took polemic positions regarding the probate of testamentary documents, the Norfolk Circuit Court held that it could not independently adjudicate either of the respective claims.<sup>278</sup> However, despite the defendants' cross-bill, nonsuit was permitted where the defendants did not raise on objection and clearly consented to the nonsuit.<sup>279</sup>

Section 8.01-380(D) is not without its judicial critics. One circuit court has expressed the view that the section goes too far in limiting the right of nonsuit.<sup>280</sup> However, most circuit courts have applied section 8.01-380(D) without similar misgivings.

The two primary issues under section 8.01-380(D) are (1) whether the claims listed therein can remain pending "for independent adjudication," and (2) whether the list of such claims is

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274. Div. of Child Support Enforcement *ex rel.* Abediyi v. Ferguson, 77 Va. Cir. 341, 343 (2008) (City of Roanoke).

275. *Id.*

276. Parsch v. Massey, 71 Va. Cir. 209, 216 (2006) (City of Charlottesville).

277. Compare *id.* at 217 (finding that non-counterclaiming defendants are not protected against a nonsuit), with Baker v. Pulliam, 42 Va. Cir. 175, 177 (1997) (City of Richmond) (finding that both defendants are protected against a nonsuit).

278. Russell v. Lipps, No. CH05-357, slip op. at 8 (Sept. 2, 2005) (City of Norfolk), available at [www.icourt.info/Opinions/judge/. . . /Lipps%20V%20Lipps.ltr.pdf](http://www.icourt.info/Opinions/judge/. . . /Lipps%20V%20Lipps.ltr.pdf).

279. *Id.*

280. See Williams v. Jones, 38 Va. Cir. 356, 356 (1996) (City of Richmond). In denying nonsuit where the adverse party had filed a cross-claim seeking only indemnification, which could not stand as a separate suit, Judge Randall G. Johnson of the City of Richmond Circuit Court stated: "While I still feel that it makes no sense not to allow a nonsuit under these circumstances, I must apply the law as written." *Id.*

exhaustive, for example, does that list include an affirmative defense, or statutory recoupment?<sup>281</sup>

In connection with the latter issue, the Virginia Court of Appeals has broadly interpreted section 8.01-380(D) as barring nonsuit wherever “an adverse party has cross-filed a claim in the litigation which cannot be independently adjudicated,”<sup>282</sup> albeit it has refused to extend the definition of “cross-bill” to a motion in a divorce case, characterized as an “application for divorce,” pursuant to Virginia Code section 20-121.02.<sup>283</sup>

The Supreme Court of Virginia, in *City of Hopewell v. Cogar*, would not extend the definition of “counterclaim” under former section 8.01-380(C) to an affirmative defense labeled and treated as such by the defense.<sup>284</sup> Moreover, in *Bremer v. Doctor’s Building Partnership*, the Supreme Court of Virginia refused to extend the definition of “counterclaim” in former section 8.01-380(C) to statutory recoupment, and upheld a grant of nonsuit to the plaintiff, notwithstanding the defendants’ pending claim for statutory recoupment under Virginia Code section 8.01-422, which could not have been independently adjudicated.<sup>285</sup> In so doing, the court determined that the term “counterclaim” in former section 8.01-380(C) (current section 8.01-380(D)) referred to former Rule 3:8 counterclaims only,<sup>286</sup> which were limited to actions at law, and excluded pleas seeking equitable relief in the form of damages under Virginia Code section 8.01-422.<sup>287</sup>

The Virginia nonsuit statute applies both in law and at equity,<sup>288</sup> and a former cross-bill in equity barred nonsuit as effectively

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281. See VA. CODE ANN. § 8.01-380(D) (Cum. Supp. 2013).

282. Clark v. Clark, 11 Va. App. 286, 297, 398 S.E.2d 82, 88 (1990).

283. Goodman v. Hamman, 19 Va. App. 71, 75, 448 S.E.2d 677, 679–80 (1994).

284. 237 Va. 264, 268, 377 S.E.2d 385, 388 (1989); accord *Bremer v. Doctor’s Bldg. P’ship*, 251 Va. 74, 80 n.5, 465 S.E.2d 787, 790 n.5 (1996).

285. *Bremer*, 251 Va. at 76–80, 465 S.E.2d at 788–90. In *Bremer*, the Court traced the development of former Rule 3:8 of the Rules of the Supreme Court of Virginia. *Id.*

286. Former Rule 3:8 of the Rules of the Supreme Court of Virginia has been replaced by current Rule 3:9. Compare VA. SUP. CT. R. pt. 6, § 11, R. 3.9 (Repl. Vol. 2013), with VA. SUP. CT. R. pt. 6 § 11, R. 3:8 (Repl. Vol. 2005).

287. *Bremer*, 251 Va. at 79–80, 465 S.E.2d at 790; see *Cummings v. Fulghum*, 261 Va. 73, 79, 540 S.E.2d 494, 497 (2001) (holding that a recoupment plea under Virginia Code section 8.01-422 is not a counterclaim or cross-claim within the meaning of Virginia Code section 8.01-233); see also *supra* note 87 (discussing the effect on this portion of *Bremer* by S.B. 1118, enacted in 2005, and current Rule 3:9).

288. *Moore v. Moore*, 218 Va. 790, 795, 240 S.E.2d 535, 538 (1978); *Goodman v. Hamman*, 19 Va. App. 71, 74 n.2, 448 S.E.2d 677, 679 n.2 (1994).

as a counterclaim on the legal side.<sup>289</sup> That is consistent with the current Rules of the Supreme Court of Virginia, where, subsequent to the abolition of the distinction between law and equity, the rule governing cross-claims, Supreme Court of Virginia Rule 3:10, applies in all civil actions, whether the claims involved arise under legal or equitable causes of action, unless otherwise provided by law.<sup>290</sup> An interesting question, therefore, is the continuing vitality of *Equitable Life Assurance Society v. Wilson*, which held that where relief sought in a cross-bill is defensive only and would be satisfied by the dismissal of the original bill, dismissal of the original bill will dismiss the cross-bill.<sup>291</sup> *Wilson* states:

But the rule is otherwise where the plaintiff in the cross-bill has equities arising out of the subject-matter of the original suit, which entitle him to affirmative relief . . . . In such case a court of equity . . . will treat the cross-bill as in the nature of an original bill and retain it, granting the relief to which the [cross-bill] plaintiff may be entitled.<sup>292</sup>

While *Wilson* involved the dismissal of the original bill on demurrer, its principles, if still valid under the current Rules of the Supreme Court of Virginia, would appear to apply equally to nonsuit.

That the bar to nonsuit prescribed in section 8.01-380(D) is confined to the claims specifically enumerated therein is further supported by *Hanlin v. Arthritis Associates*, which held that, in a medical malpractice case, a defendant's request for a medical malpractice review panel does not prohibit the plaintiff's nonsuit while the requested panel's review is still pending, nor do the provisions of Virginia Code section 8.01-581.2 stay the proceedings during the panel's review.<sup>293</sup>

The amount of the counterclaim which will bar nonsuit under section 8.01-380(D) in an appeal to circuit court does not have to exceed the exclusive original jurisdiction of the general district court.<sup>294</sup> In *Gilbreath v. Brewster*, the Supreme Court of Virginia

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289. *Parsch v. Massey*, 71 Va. Cir. 209, 213 (2006) (City of Charlottesville); *Walker v. Walker*, 19 Va. Cir. 390, 391 (1990) (Clarke County).

290. VA. SUP. CT. R. pt. 6, § II, R. 3:10 (Repl. Vol. 2013).

291. 110 Va. 571, 573, 66 S.E. 836, 837 (1910).

292. *Id.*

293. 37 Va. Cir. 125, 125-26 (1995) (Fairfax County).

294. Virginia Code section 16.1-77(1) gives exclusive original jurisdiction to the general district court for claims not exceeding \$4,500, excluding interest and contracted-for attor-

found that a counterclaim for \$50 was sufficient to bar nonsuit, albeit a claim in that amount, in an independent action, would place the claim exclusively within the general district court's jurisdiction.<sup>295</sup>

*Gilbreath* also provides guidance on the second primary issue under section 8.01-380(D); specifically, whether a claim enumerated therein can remain pending "for independent adjudication."<sup>296</sup> The counterclaim in *Gilbreath* was for property damage suffered by the defendants in an automobile accident, on account of which the plaintiff-driver was suing for her personal injury claims.<sup>297</sup> The court found that resolution of the counterclaim would require determination of the plaintiff-driver's liability for the accident, and "[t]hus [the defendants' counterclaim] could not be independently adjudicated because 'adjudication of one claim would be an adjudication of both.'"<sup>298</sup> The same principle was applied in *Lee Gardens Arlington Limited Partnership v. Arlington County Board*, where the counterclaim of the county, seeking an increase in the taxpayer's property assessment, barred nonsuit of the taxpayer's claim against the county seeking a decrease in the property assessment.<sup>299</sup> The Supreme Court of Virginia determined that since the property's fair market value was the ultimate issue common to both claims, the counterclaim could not remain for independent adjudication, because "an adjudication of one claim would be an adjudication of both."<sup>300</sup> Accordingly, a

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ney's fees, and concurrent jurisdiction with the circuit courts of any such claim when the amount thereof exceeds \$4,500 but does not exceed \$25,000, excluding interest and contracted-for attorney's fees. VA. CODE ANN. § 16.1-77(1) (Cum. Supp. 2013). Compare *Gilbreath v. Brewster*, 250 Va. 436, 442, 463 S.E.2d 836, 838-39 (1995), with *Conner v. Rose*, 252 Va. 57, 58, 471 S.E.2d 478, 479 (1996).

295. 250 Va. at 442, 463 S.E.2d at 838-39.

296. VA. CODE ANN. § 8.01-380(D) (Cum. Supp. 2013).

297. *Gilbreath*, 250 Va. at 438, 463 S.E.2d at 836.

298. *Id.* at 442, 463 S.E.2d at 839 (quoting *Lee Gardens Arlington Ltd. P'ship v. Arlington Cnty. Bd.*, 250 Va. 534, 541, 463 S.E.2d 646, 649 (1995)); see also *Jay-Ton Constr. Co., Inc. v. Bowen Constr. Servs., Inc.*, 62 Va. Cir. 414, 424 (2003) (City of Portsmouth) (applying *Gilbreath* and holding that a counterclaim would be an adjudication of both plaintiff's and defendant's claims and, therefore, could not remain for independent adjudication). In *Jay-Ton Construction Co.*, the counterclaim requested the court to determine the amounts owed by the plaintiff to the defendant under the contract for the plaintiff's overstatement of the percentage of work completed, and to then apply those amounts against the sum sought by the plaintiff for defendant's breach of contract—"an adjudication of the counterclaim 'would be an adjudication of both.'" *Id.* (quoting *Gilbreath*, 240 Va. at 442, 463 S.E.2d at 839).

299. 250 Va. 534, 541, 463 S.E.2d 646, 649 (1995).

300. *Id.*

plaintiff will be unable to nonsuit its claim if the facts and circumstances out of which that claim arose would compel the adjudication of both plaintiff's claim and the defendant's counterclaim.<sup>301</sup>

*Gilbreath* also made clear that no inquiry need be conducted as to "independent adjudication" when a third-party claim for contribution is pending. "There is no question that a third-party claim is a derivative claim and as such it cannot be adjudicated independently."<sup>302</sup>

A third-party claim will bar nonsuit despite the potential legal insufficiency of that claim. Thus, a third-party claim for indemnification will bar the nonsuit of a plaintiff's negligence claim, even though a defendant who is guilty of active negligence cannot obtain indemnification from another defendant.<sup>303</sup> In *Melton v. Liebrecht*, the court noted that negligence is a jury question, not a question of law, and accordingly, the plaintiff's allegation of the third-party plaintiff's negligence did not permit the court to determine whether that negligence was active, vis-à-vis derivative or vicarious, so as to bar the third-party indemnification claim and permit nonsuit.<sup>304</sup>

The mere filing of a dependent counterclaim, cross-claim or third-party claim does not automatically bar nonsuit by the plaintiff. It does so only when there is no consent to the nonsuit by the adverse party who has filed such a dependent claim.<sup>305</sup> Accordingly, an order of nonsuit may not be entered when the adverse party filing such a claim has not been given notice of the motion for nonsuit.<sup>306</sup> *Iloff v. Richards* rejected the cross-claim defendant's

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301. *Parsch v. Massey*, 71 Va. Cir. 209, 215 (2006) (City of Charlottesville). Both the complaint and counterclaims turned on the legitimacy of a specific loan transaction; hence the counterclaims were dependent and incapable of independent adjudication. *Id.*

302. *Gilbreath*, 250 Va. at 442, 463 S.E.2d at 839; *accord* *Mohlman v. Republic Servs. of Va., LLC*, 81 Va. Cir. 293, 297 (2010) (Fairfax County); *see also* Bd. of Dirs. of the Lesner Pointe Condo. on the Chesapeake Bay Ass'n, Inc. v. Harbour Point Bldg. Corp., 2002 Va. Cir. LEXIS 421, at \*9 (Va. Cir. Ct. Oct. 25, 2002) (City of Virginia Beach) (applying the same principle to a third-party claim for indemnification and citing *Skinner v. Clements*, 45 Va. Cir. 482, 486 (1998) (Spotsylvania County) (holding that "[a] third-party claim for contribution or indemnification, by its very nature, cannot 'remain pending for independent adjudication'")).

303. *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 411, 368 S.E.2d 268, 285 (1988).

304. *Melton v. Liebrecht*, 40 Va. Cir. 192, 194 (1996) (Albemarle County). If the negligence was active, the defendant could not recover. *Id.*

305. VA. CODE ANN. § 8.01-380(D) (Cum. Supp. 2013).

306. *Iloff v. Richards*, 221 Va. 644, 648, 272 S.E.2d 645, 647-48 (1980).

argument that entry of the nonsuit order was harmless error, because the cross-claim plaintiff could conceivably have taken steps after learning of the nonsuit order, for example, moving to vacate the order, beginning a third-party action, or instituting a separate suit by motion for judgment.<sup>307</sup> In *Iloff*, the cross-claim plaintiff “having properly instituted his action against [the cross-claim defendant] by the inexpensive cross-claim method, was not bound to expend additional time, and possibly incur added expense, in an effort to prosecute a claim which once had been pending but subsequently had been rendered a nullity without notice to him.”<sup>308</sup> This requirement of notice to the party who has filed a dependent counterclaim, cross-claim, or third party claim should be contrasted with the rule previously discussed that a plaintiff may be granted an *initial* nonsuit of right without prior notice to the defendant.<sup>309</sup>

E. *Nonsuit and the Statute of Limitations Applicable to the Action Nonsuited*

1. Original Limitation Period Not Tolloed by Commencement and Pendency of Action Subsequently Nonsuited

The nonsuit statute, Virginia Code section 8.01-380, is silent as to the relationship between voluntary nonsuit and the statute of limitations applicable to the action nonsuited. That issue is primarily addressed in Virginia Code section 8.01-229(E)(3), which states that:

If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1 [applying to the death of a party entitled to bring a personal action], whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court, and shall apply to all actions irrespective of whether they arise under common law or statute.<sup>310</sup>

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307. *Id.* at 649, 272 S.E.2d at 648.

308. *Id.*

309. *See supra* notes 99–101 and accompanying text.

310. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2013).

The tolling provisions of section 8.01-229(E)(3) must be distinguished from those of section 8.01-229(E)(1). Under section 8.01-229(E)(1), the time during which a timely filed action is pending is not included as part of the period within which the action could have been brought, and if such action is later dismissed or abates it may be refiled “within the remaining period.”<sup>311</sup> Not so, under section 8.01-229(E)(3), whereby a nonsuiting plaintiff has three possible periods in which to renew the nonsuited action: (1) Within six months of the date of the nonsuit order, (2) within the original period of limitation, or (3) within the period provided in subsection (B)(1), which is applicable to the death of a party.<sup>312</sup> Under section 8.01-229(E)(3), the original period of limitation is not tolled upon the commencement and pendency of an action subsequently nonsuited.<sup>313</sup> In *Simon v. Forer*, the Supreme Court of Virginia held: “The question we must answer is whether an original period of limitation is tolled upon commencement of a nonsuited action. We conclude that it is not.”<sup>314</sup>

This principle is easily understood in the following example. A complaint is filed three months prior to the expiration of the applicable statute of limitations. It remains pending for four months. If it proceeds to trial and is not nonsuited, the action is not subject to dismissal for being untimely, since the statute of limitations is tolled during its pendency. If, however, the action is nonsuited, it must be refiled within the six-month period prescribed by section 8.01-229(E)(3), or it is subject to dismissal for violation of the statute of limitations. Once the original complaint was nonsuited, the period of its pendency no longer tolled the statute of limitations, as section 8.01-229(E)(1) does not apply to an action which is nonsuited.<sup>315</sup>

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311. *Id.* § 8.01-229(E)(1).

312. *Id.* § 8.01-229(E)(3).

313. *Simon v. Forer*, 265 Va. 483, 489–90, 578 S.E.2d 792, 795–96 (2003).

314. *Id.* at 489, 578 S.E.2d at 795 (internal quotation marks omitted); *see also* *Ticonderoga Farms, Inc. v. Bd. of Supervisors*, 72 Va. Cir. 365, 368 (2006) (Loudoun County) (“[W]here an action is terminated by nonsuit, the period the action is pending is computed as part of the period within which the action may be brought, unless the plaintiff renews the action within six months of the date of the order of nonsuit.”); *Verdolotti v. Chung*, 56 Va. Cir. 358, 359 (2001) (City of Portsmouth) (“It is well established that the filing and subsequent pendency of an action does not typically ‘toll’ the statute of limitations.”).

315. *See Simon*, 265 Va. at 489, 578 S.E.2d at 795. This rule is the same in the federal courts. *See Neal v. Xerox Corp.*, 991 F. Supp. 494, 498 (E.D. Va. 1998) (“Generally, [t]he statute of limitations is not tolled by bringing an action that later is dismissed voluntarily under [Federal Rule of Civil Procedure 41(a)].”) (quoting 9 WRIGHT & MILLER, *supra* note

## 2. Other Limitations Issues

By the plain terms of section 8.01-229(E)(3), its six-months tolling provision is triggered by the *entry of the order* of nonsuit.<sup>316</sup> However, when a circuit court's grant of nonsuit is appealed to the Supreme Court of Virginia, and is there affirmed, the "date of the order entered by the court," as prescribed in section 8.01-229(E)(3), is not the date of the circuit court's original nonsuit order, but the subsequent date of the circuit court's order which enters "as its own," under Virginia Code section 8.01-685 following the Supreme Court of Virginia's mandate affirming the original nonsuit order.<sup>317</sup>

Section 8.01-229(E)(3) provides the authority to timely "recommence" a nonsuited action within six months "*from*" the date of the nonsuit order.<sup>318</sup> The meaning of "from" was considered in *Laws v. McIlroy*, which held that "from" permits the six-month tolling provision of section 8.01-229(E)(3) to run either forward or backward in time, "within" the six-month period.<sup>319</sup> Thus, a "recommenced" or "new" action may permissibly predate the nonsuit order by that six-month period, and be timely within the purview of section 8.01-229(E)(3), even though the original (later nonsuited) action was pending at that time.<sup>320</sup> *Laws* rejected the opinion expressed in *Payne v. Brake* that section 8.01-229(E)(3) requires the "recommencement" or refileing be after the date of the nonsuit order.<sup>321</sup>

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83, at § 2367); *see also* *Stokes v. Pullen*, 122 F.3d 1062 (4th Cir. 1997) (per curiam) (unpublished table decision) (full text available in Westlaw, No. 94-1038, 1997 WL 577642 (4th Cir. September 18, 1997)); *Pendleton v. Nat'l Wildlife Fed'n*, No. 5:10 DV 00009, 2010 U.S. Dist. LEXIS 29433, at \*9, \*10 (W.D. Va. March 26, 2010) (holding that the filing of a complaint that is dismissed without prejudice does not toll the statutory filing period of Title VII); *Braxton v. Va. Folding Box Co.*, 72 F.R.D. 124, 126 (E.D. Va. 1976).

316. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2013); *see* *Bowie v. Murphy*, 271 Va. 127, 132 n.5, 624 S.E.2d 74, 78 n.5 (2006) (citing *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984)); *accord* *City of Suffolk v. Lummis Gin Co.*, 278 Va. 270, 275, 683 S.E.2d 549, 552 (2009).

317. *Phipps v. Liddle*, 267 Va. 344, 347, 593 S.E.2d 193, 195 (2004); *see supra* note 130.

318. VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 2013) (emphasis added).

319. 283 Va. 594, 601–03, 724 S.E.2d 699, 703–04 (2010); *see supra* note 129 and accompanying text.

320. *Id.* at 600–01, 724 S.E.2d at 703–04.

321. *Id.* at 603, 724 S.E.2d at 704 (declining to follow *Payne v. Brake*, 337 F. Supp. 2d 800, 803 (W.D. Va. 2004)).

In *Clark v. Butler Aviation-Washington National, Inc.*, the Supreme Court of Virginia harmonized the apparent conflict between former Rule 3:3 and Virginia Code sections 8.01-229(E)(3) and 8.01-380.<sup>322</sup> Former Supreme Court of Virginia Rule 3:3 (and former Supreme Court of Virginia Rule 2:4, in equity) provided that no judgment shall be entered against a defendant served with process more than one year after the commencement of the action, unless the plaintiff has exercised due diligence to have timely service made.<sup>323</sup> These provisions are now found in current Supreme Court of Virginia Rule 3:5(e).<sup>324</sup> In *Clark*, the plaintiff's motion for judgment was filed two days before the two-year statute of limitations was due to run.<sup>325</sup> The defendant was not served with process until more than one year after the filing of the motion for judgment.<sup>326</sup> The defendant moved to quash the service of process, but before any action was taken on that motion, the plaintiff was granted a nonsuit.<sup>327</sup> The plaintiff then refiled his action, more than two years after the claim arose, but within a six-month period after the nonsuit, as permitted by section 8.01-229(E)(3).<sup>328</sup> The court allowed the refiled action to proceed, upholding the plaintiff's "justifiable expectation" of the benefits of section 8.01-229(E)(3), and rejecting the defendant's claim of a "vested right" to assert the time limits of former Rule 3:3 and the two-year statute of limitations.<sup>329</sup>

*Clark* permitted the plaintiff's nonsuit despite the "due diligence" provision of former Rule 3:3 (and former Rule 2:4, in equity).<sup>330</sup> In *Clark*, the nonsuit was obtained more than one year after the action was commenced, during which time the defendant had not been served with process, and no finding of "due diligence" had been made.<sup>331</sup> The key to the result in *Clark* is that the court

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322. 238 Va. 506, 511–12, 385 S.E.2d 847, 848–49 (1989).

323. VA. SUP. CT. R. 3:3 (Repl. Vol. 2006); VA. SUP. CT. R. 2:4 (Repl. Vol. 2006); *Clark*, 238 Va. at 508, 385 S.E.2d at 848.

324. VA. SUP. CT. R. 3:5(e) (Repl. Vol. 2013).

325. *Clark*, 238 Va. at 508, 385 S.E.2d at 847.

326. *Id.*

327. *Id.*

328. *Id.*; see VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2013).

329. *Clark*, 238 Va. at 512 n.5, 385 S.E.2d at 850 n.5.

330. *Id.* at 508 n.1, 385 S.E.2d at 848 n.1.

331. *Id.* In *Clark*, the court noted that it reached its holding regardless of whether the plaintiff's second filing was considered a "new action," or merely a "recommencement" of the original action. *Id.* at 512 n.4, 385 S.E.2d at 850 n.4.

had neither previously dismissed the action, nor had a motion to dismiss under former Rule 3:3 been “submitted” to it under Virginia Code section 8.01-380(A).<sup>332</sup>

In *McManama v. Plunk*, the Supreme Court of Virginia reaffirmed its holding in *Clark*, and rejected the defendant’s assertion that he had a “substantive right” not to be sued for personal injuries arising out of a motor vehicle accident more than two years after the accident.<sup>333</sup> Also, as previously discussed, *Waterman v. Halverson* construed *McManama* as standing “for the proposition that a plaintiff can secure a valid voluntary nonsuit pursuant to [section] 8.01-380 even though there has been no service of process on the defendants.”<sup>334</sup> The Supreme Court of Virginia reaffirmed that proposition in *Berry v. F&S Financial Marketing, Inc.*<sup>335</sup>

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332. See generally *id.* at 506, 385 S.E.2d at 847. A dismissal under former Rule 3:3 (and presumptively under current Rule 3:5(e)) is with prejudice, rendering any dismissed claim no longer viable. See *Gilbreath v. Brewster*, 250 Va. 436, 441–42, 463 S.E.2d 836, 838 (1995). Accordingly, a motion to dismiss under former Rule 3:3 (and presumptively under current Rule 3:5(e)) is “case dispositive” within the meaning of *Wells v. Lorcom House Condo. Council of Co-Owners*, 237 Va. 247, 252, 377 S.E.2d 381, 384 (1989).

333. *McManama v. Plunk*, 250 Va. 27, 33–35, 458 S.E.2d 759, 762–63 (1995).

334. *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001); see *supra* notes 99–101 and accompanying text.

335. *Berry v. F&S Fin. Mktg., Inc.*, 271 Va. 329, 333, 626 S.E.2d 821, 823 (2006) (“[T]his Court has consistently held that a plaintiff has a right to a voluntary nonsuit even though proper service of process has not been made upon the defendant.”). *Berry* was a case in which the defendant convinced the general district court to set aside a default judgment against her on the basis that the plaintiff did not exercise due diligence to locate her, and that service through the Secretary of the Commonwealth was not effective. *Id.* at 331, 626 S.E.2d at 822. The plaintiff moved for nonsuit, followed by the defendant’s motion to dismiss the action with prejudice, on the ground no legal service had been effected on her within one year. *Id.* at 331–32, 626 S.E.2d at 822. After the general district court granted the nonsuit, the defendant appealed to the circuit court, which held that the plaintiff was entitled to a nonsuit. *Id.* at 332, 626 S.E.2d at 822. In its decision, the Supreme Court of Virginia stated that it “once again address[ed] the interplay between a plaintiff’s right to a voluntary nonsuit under Code § 8.01-380 and the bar against judgment in former Rule 3:3(c).” *Id.* at 330–31, 331 n.1, 626 S.E.2d at 822, 822 n.1. The court reaffirmed *McManama* and *Clark* in rejecting the defendant’s claim that she had a “vested right” to a dismissal with prejudice under former Rule 3:3(c) and Virginia Code section 8.01-275.1. *Id.* at 334, 626 S.E.2d at 824. The court also noted that when the general district court made its finding regarding the lack of due diligence by the plaintiff, the defendant “had only moved to set aside the default judgment on the basis that service of process through the Secretary of the Commonwealth was not valid; she had not asserted any right to a dismissal under Rule 3:3(c). Therefore, [she] had no justifiable expectation of a Rule 3:3 . . . defense under Virginia law that was entitled to protection under the due process clause of the Constitution.” *Id.* at 334, 626 S.E.2d at 824 (citing *McManama*, 250 Va. at 35, 458 S.E.2d at 763). In this latter connection, the court specifically noted that “[w]e do not decide in this appeal whether Berry was entitled to move for dismissal under Rule 3:3(c)

Moreover, *McManama* made it clear that a nonappealable voluntary nonsuit is not a dismissal “without determining the merits,” within the purview of the tolling provisions of Virginia Code section 8.01-229(E)(1).<sup>336</sup> Accordingly, it is Virginia Code section 8.01-229(E)(3), not section 8.01-229(E)(1), which governs the tolling of the statute of limitations during the pendency of a nonappealable nonsuited action.<sup>337</sup> *McManama* left unanswered the interrelationship of sections 8.01-229(E)(1) and 8.01-229(E)(3) in the case of a final, appealable nonsuit order.<sup>338</sup>

The tolling provisions of section 8.01-229(E)(3) assume that the “refiled” cause of action was that which was nonsuited.<sup>339</sup> If the “refiled” cause of action is a new cause of action, or involves different parties, its statute of limitations will not be tolled by the original suit.<sup>340</sup> The addition of new counts in a complaint, or an increase in the original ad damnum clause, does not make the refiled complaint a new cause of action, provided the new counts

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since she was never actually served with process.” *Id.* at 334 n.8, 626 S.E.2d at 824 n.8. For a further discussion of *Berry*, see Konvicka, *supra* note 2.

336. *McManama*, 250 Va. at 32, 458 S.E.2d at 762; see *infra* Part V.E.3 (discussing that a dismissal without prejudice is not the equivalent of a nonsuit for purposes of section 8.01-229(E)(3)).

337. See *Simon v. Fores*, 265 Va. 483, 489–90, 578 S.E.2d 792, 795–96 (2003).

338. For a discussion of the appealability of nonsuit orders, see *infra* Part IX.

339. Section 8.01-229(E)(3) does not require a plaintiff to bring back the same motion for judgment that was nonsuited in order to fall under the tolling provision. See *Odenael v. Thompson*, 63 Va. Cir. 71, 72–73 (2003) (Fairfax County). The plaintiff need only bring back the same *cause of action*, determined by applying the “same conduct, transaction or occurrence test.” *Dunston v. Huang*, 709 F. Supp. 2d 414, 419 (E.D. Va. 2010) (rejecting the former “same evidence” test). In this context, the use of the term “action” in section 8.01-229(E)(3) does not limit a nonsuiting plaintiff to one right of action, so long as all rights of action arise out of the same “cause of action.” VA. CODE ANN. § 8.01-229(E)(3) (Cum. Supp. 2013).

340. See *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 171 (1996); cf. *Wilby v. Costel*, 265 Va. 437, 445–46, 587 S.E.2d 796, 800–01 (2003) (holding that where both simple negligence and willful and wanton negligence are alleged in the same count of a motion for judgment, the grant of partial summary judgment finding the plaintiff guilty of contributory negligence and therefore barring recovery for simple negligence, did not require that a subsequent nonsuit granted to the plaintiff preserve the ruling that the defendant was contributorily negligent, or limit any refiling by the plaintiff solely to willful and wanton negligence). Where the same count of a motion for judgment alleges the defendant’s conduct is both negligent and willful and wanton, the allegations do not represent separate claims or theories of liability. *Id.* at 445, 476 S.E.2d at 800–01. Rather, in this context, negligent and willful and wanton conduct merely refer to different degrees of proof that can be applied to the same theory of liability. *Id.*, 476 S.E.2d at 801. As previously discussed, in contrasting the tolling provisions of section 8.01-229(E)(1) with those of section 8.01-229(E)(3) in the context of a nonsuit, the tolling of the statute of limitations is effected solely by the three-period tolling provisions of section 8.01-229(E)(3), which do not include the period during which an action is pending. See *supra* Part V.E.1.

arise out of the same conduct, transaction, or occurrence as the original, nonsuited cause of action.<sup>341</sup>

The tolling provisions of section 8.01-229(E)(3) also assume that the original, nonsuited cause of action was a valid and pending cause of action or claim, and one over which the court had subject matter jurisdiction. Otherwise, such an action is not subject to nonsuit since it is void ab initio.<sup>342</sup>

The Circuit Court of Rockingham County has held that the tolling provisions of section 8.01-229(E)(3) do not apply to the nonsuit of an action in circuit court brought under the Fair Labor Standards Act.<sup>343</sup> However, where a plaintiff's substantive rights are not defined by a federal statute with its own limitations period, the federal statute becomes a Virginia statute of limitations, as in *Scoggins v. Douglas*.<sup>344</sup> Then, Virginia's tolling statute section 8.01-229(E)(3) applies.

In order to claim protection against the statute of limitations under the tolling provisions of section 8.01-229(E)(3), the order dismissing the original action without prejudice should clearly state that it is granting the plaintiff a nonsuit pursuant to Virginia Code section 8.01-380. However, where an order dismissing the

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341. See *infra* Part V.E.4; see also *Swann*, 252 Va. at 182, 476 S.E.2d at 172; *Martin v. DeJarnett*, 67 Va. Cir. 168, 170 (2005) (City of Charlottesville) (finding that where the original suit is a nullity, the statute of limitations is not tolled, and plaintiff cannot save the improperly filed suit by exercising his right to nonsuit years after the limitations period has expired); *Nguyen v. Long*, 60 Va. Cir. 168, 169 (2002) (Fairfax County) (clarifying that while misnomer may be corrected by amendment, when the wrong person is named, that filing does not toll the statute of limitations); *Collier v. Arby's, Inc.*, 57 Va. Cir. 414, 417 (2002) (City of Charlottesville) (holding that a nonsuited case does not toll the personal injury statute of limitations where, almost seven years after the injury, plaintiff seeks to sue a new party under new causes of action); *Ely v. Shirley's Barbeque, Inc.*, 30 Va. Cir. 302, 305 (1993) (City of Roanoke) (holding that where original suit for simple negligence is nonsuited, a "refiled" suit for negligence per se is a new cause of action).

342. See *supra* Part V.A.1; see also *Morrison v. Bestler*, 239 Va. 166, 173, 387 S.E.2d 753, 758 (1990) (finding that the trial court had subject matter jurisdiction and, therefore, authority to enter a valid nonsuit order); *Swango v. Horning*, 19 Va. Cir. 441, 443 (1990) (Fairfax County) (citing *In re Adams*, 809 F.2d 1187, 1189 (5th Cir. 1987)) (holding that once a case is removed to federal court, a Virginia circuit court loses jurisdiction to grant nonsuit).

343. See *Marston v. Weaver*, 69 Va. Cir. 301, 304 (2005) (Rockingham County) (citing *Hewlett v. Russo*, 649 F. Supp. 457, 460 (E.D. Va. 1986)) (holding that section 8.01-229(E)(3) does not toll Title VII claims because when a federal statute of limitations is applicable, a court must look to federal law for any appropriate tolling provisions); *accord Chandler v. Norfolk & W. Ry. Co.*, 15 Va. Cir. 437, 443 (1989) (City of Roanoke).

344. *Scoggins v. Douglas*, 760 F.2d 535, 537 (4th Cir. 1985) (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980)).

original action without prejudice reflects that it was upon the motion of the plaintiff and was endorsed by all counsel, the omission of any reference to the word “nonsuit,” or to section 8.01-380, may not be fatal to its construction as an order granting nonsuit and gaining the protection of section 8.01-229(E)(3).<sup>345</sup>

Virginia Code section 8.01-244(b) provides that when a wrongful death action under section 8.01-50 abates or is dismissed, without determining the merits of such action, the time such action was pending is not counted as any part of the two-year period after the decedent’s death in which a wrongful death action must be brought by the decedent’s personal representative.<sup>346</sup> Prior to July 1, 1991, when such an action was nonsuited, the tolling provision of section 8.01-229(E)(3) did not apply to permit the plaintiff to refile within six months of the nonsuit.<sup>347</sup> However, effective July 1, 1991, section 8.01-244(B) was amended to provide that if the plaintiff takes a nonsuit, the nonsuit shall not be deemed the abatement or dismissal previously described, and that the provisions of section 8.01-229(E)(3) apply to the nonsuited action.<sup>348</sup>

The Supreme Court of Virginia described the interrelationship between section 8.01-229(E)(3), and section 8.01-244(B), governing the effect of the death of a party on the statute of limitations, in *Douglas v. Chesterfield County Police*.<sup>349</sup> If a personal representative qualifies more than two years after the death of a decedent, and subsequently takes a nonsuit on the last day of the outer time-limit for filing a personal action on behalf of the estate, the tolling provision of section 8.01-229(E)(3), interacting with the “deeming” provision of section 8.01-229(B)(2)(6), adds six months to that outer time-limit.<sup>350</sup> The “all actions” language of the post-1991 version of section 8.01-229(E)(3) does not, however, apply to the dismissal without prejudice of a worker’s claim for benefits by the Workers’ Compensation Commission.<sup>351</sup>

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345. *Edwards v. Bertha’s Beauty Salon*, 37 Va. Cir. 1, 1 (1995) (City of Alexandria).

346. VA. CODE ANN. § 8.01-244(B) (Cum. Supp. 2013).

347. *Dodson v. Potomac Mack Sales & Serv.*, 241 Va. 89, 94–95, 400 S.E.2d 178, 181 (1991).

348. Act of Apr. 30, 1991, ch. 722, 1991 Va. Acts 1411 (codified as amended at VA. CODE ANN. § 8.01-244(B) (Cum. Supp. 1991)).

349. 251 Va. 363, 467 S.E.2d 474 (1996).

350. *Id.* at 367, 467 S.E.2d at 476.

351. *See Jenkins v. Webb*, 47 Va. App. 404, 410, 624 S.E.2d 115, 117–18 (2006) (rejecting the contention that such action by the Commission was, in essence, a nonsuit).

Section 8.01-229(E)(3) does not apply to *contractual* periods of limitation, being limited, by its plain meaning, to *statutes* of limitation.<sup>352</sup> Accordingly, despite the fact that a plaintiff has agreed to be bound by a contractual period of limitations, the tolling provisions of section 8.01-229(E)(3) are not applicable.<sup>353</sup> However, if a contractual period of limitations is prescribed by statute, such as those applicable to public construction bonds or to standard fire insurance policy provisions, then the limitations period is considered to derive from the statute and not the parties' contract, making *Massie* inapplicable, and invoking the tolling provisions of section 8.01-229(E)(3).<sup>354</sup>

While the tolling provisions of section 8.01-229(E)(3) are not applicable to a contractual period of limitations, one circuit court has held that the tolling provisions of section 8.01-229(E)(1) do apply.<sup>355</sup> Section 8.01-229(E)(1) was also held to extend the statute of limitations when an action filed in federal court was dismissed for failure to meet jurisdictional requirements.<sup>356</sup> The tolling provisions of section 8.01-229(E)(3) are also inapplicable to the thirty-day limitations period prescribed by Virginia Code section 15.2-2285 for challenging a zoning amendment in circuit court.<sup>357</sup>

Another statute of limitations issue relating to nonsuits is the doctrine of "relation back," contained in section 8.01-6, which pertains to an amendment changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise.<sup>358</sup> As previously noted, in order to toll the statute of limitations, a suit must be filed against a proper party.<sup>359</sup> Where a plaintiff fails to name the proper party in his original action, and takes a nonsuit, he is not entitled to the "relation back" provisions of section 8.01-

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352. *Massie v. Blue Cross & Blue Shield of Va.*, 256 Va. 161, 165, 500 S.E.2d 509, 511 (1998).

353. *Id.*

354. See *Zaeno Int'l, Inc. v. State Farm Fire & Casualty*, 152 F. Supp. 2d 882, 885 (E.D. Va. 2001) (fire insurance policy); *MarTech Mech., Ltd. v. Chianelli Bldg. Corp.*, 54 Va. Cir. 569, 575 (2001) (City of Norfolk) (public payment bond); *Southside Utils., Inc. v. Abante Corp.*, 54 Va. Cir. 288, 293 (2000) (City of Norfolk) (public payment bond).

355. See *Nicholson v. Nationwide Mut. Ins. Co.*, 49 Va. Cir. 443, 446 (1999) (Frederick County) (distinguishing *Massie*, 256 Va. 161, 500 S.E.2d 509).

356. See *Luddeke v. U.S.A.A.*, 40 Va. Cir. 270, 271 (1996) (City of Alexandria).

357. *Ticonderoga Farms, Inc. v. Bd. of Supervisors*, 72 Va. Cir. 365, 368 (2006) (Loudoun County).

358. VA. CODE ANN. § 8.01-6 (Repl. Vol. 2007 & Cum. Supp. 2013).

359. See *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 171 (1996).

6 upon filing a second action against the proper party. Section 8.01-6, which is in derogation of the common law, is expressly limited to *an amendment*, and does not apply to *the refiling* of an action after a nonsuit.<sup>360</sup>

### 3. Dismissal Without Prejudice Is Not the Equivalent of a Nonsuit for Purposes of Section 8.01-229(E)(3)

Dismissal without prejudice is a concept in the Virginia nonsuit structure that has a dual character. Part V.B.1 of this article previously discussed the extent to which dismissal without prejudice is the functional equivalent of a nonsuit for purposes of designating a subsequent nonsuit as an additional nonsuit under section 8.01-380(B).<sup>361</sup>

A separate question is whether dismissal without prejudice is the functional equivalent of a nonsuit for purposes of section 8.01-229(E)(3). It is not.<sup>362</sup> Section 8.01-229(E)(3) provides that when a case is nonsuited, the plaintiff is provided an additional six months from the date of entry of the nonsuit or the remaining limitations period, whichever is longer, to refile his action.<sup>363</sup> Section 8.01-229(E)(3) does not use the words “dismissed” or “dismissal,” and specifically uses the word *nonsuit*.<sup>364</sup> In contrast, section 8.01-229(E)(1) provides that when a case is dismissed without determining the merits (dismissed without prejudice), a plaintiff is permitted to refile only within the remaining statute of limitations period.<sup>365</sup> Section 8.01-229(E)(1) does not use the word “nonsuit” and specifically uses the word “*dismissed*.”<sup>366</sup> Accordingly, for purposes of sections 8.01-229(E)(1) and (E)(3), “[t]his distinction between the applicable statutes of limitation

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360. See *Antoine v. Reeves*, 63 Va. Cir. 585, 587 (2004) (City of Norfolk) (citing *Gearing v. Every Citizen Has Opportunities, Inc.*, 59 Va. Cir. 41, 44 (2002) (Loudoun County)); *accord Harvey v. Mech. Air Servs., Inc.*, 69 Va. Cir. 214, 216–17 (2005) (City of Norfolk).

361. See *supra* Part V.B.1.

362. A dismissal without prejudice is not the only concept in the Virginia nonsuit structure that has a dual character. A nonsuit order is generally not a final order for purposes of appeal. *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 761 (1995). Yet, a nonsuit order is a final order for purposes of Rule 1:1. *James v. James*, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002).

363. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2013).

364. *Id.* (emphasis added).

365. *Id.* § 229(E)(1) (Repl. Vol. 2007 & Cum. Supp. 2013).

366. *Id.* (emphasis added).

reveals a legislative intent to differentiate between a dismissal without prejudice and a nonsuit.<sup>367</sup>

4. To Take Advantage of the Tolling Provisions of Virginia Code Section 8.01-229(E)(3), the Cause of Action Refiled After Nonsuit Must Be the Same Cause of Action Which Was Nonsuited

One of the important aspects of obtaining a nonsuit in Virginia is the ability to recommence the nonsuited cause of action in a trial de novo, within a six-month window, to avoid any bar of the statute of limitations.<sup>368</sup> However, as discussed in Part V.E.2, the cause of action recommenced must be the same cause of action which was nonsuited.<sup>369</sup> This requirement is met if the refiled action arises out of the same conduct, transaction, or occurrence as the nonsuited action. If it does, it need not recite the same claims or ad damnum clause.<sup>370</sup>

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367. *Joseph v. Giant Food, Inc.*, 61 Va. Cir. 143, 147 (2003) (Fairfax County); *cf. Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 345–46, 732 S.E.2d 703, 707–08 (2012) (rejecting the contention that section 8.01-229(E)(3) calls for a voluntary dismissal in federal court to be treated as a voluntary nonsuit prescribed in section 8.01-380); *McManama*, 250 Va. at 30–32, 458 S.E.2d at 761–62 (disagreeing with the trial court’s ruling that a nonsuit order had the limited effect of being a dismissal order without determining the merits, and that section 8.01-229(E)(1) governed the tolling of the statute of limitations during the pendency of the first (nonsuited) action). *But see Edwards v. Bertha’s Beauty & Barber Salon, Ltd.*, 35 Va. Cir. 367, 367 (1995) (City of Alexandria) (holding that an order dismissing a case without prejudice, but not mentioning nonsuit or section 8.01-380, was nevertheless a nonsuit under section 8.01-380).

368. VA. CODE ANN. § 8.01-229(E)(3) (Repl. Vol. 2007 & Cum. Supp. 2013); *Ford Motor Co. v. Jones*, 266 Va. 404, 406, 587 S.E.2d 579, 580 (2003); *James v. James*, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002); *Dalloul v. Agbey*, 255 Va. 511, 515, 499 S.E.2d 279, 282 (1998).

369. *McKinney v. Va. Surgical Assocs., P.C.*, 284 Va. 455, 460–61, 732 S.E.2d 27, 29–30 (2012); *see Dunston v. Huang*, 709 F. Supp. 2d 414, 418 (E.D. Va. 2010).

370. *See Dunston*, 709 F. Supp. 2d at 420 (holding that new claims were permitted in a refiled medical malpractice action after a nonsuit, even though the additional claims would otherwise have been barred by the statute of limitations, because they arose out of the same transaction or occurrence as the nonsuited claims); *Vaughn v. First Liberty Ins. Co.*, No. 3:09-cv-364, 2009 U.S. Dist. LEXIS 108045, at \*5 (E.D. Va. Nov. 19, 2009) (permitting refiled action after nonsuit to add new claims of breach of contract and declaratory relief to nonsuited petition to appoint an umpire because they arose from the same set of operative facts as the nonsuited claim); *United States ex rel. Herndon v. Appalachian Reg’l Cmty. Head Start, Inc.*, 572 F. Supp. 2d 663, 664 (W.D. Va., 2008) (holding that after nonsuit, Virginia Code section 8.01-229(E)(3) saves all operative facts supporting any right of action claimed, regardless of the particular label); *Am. Express Centurion Bank v. Tsai*, 73 Va. Cir. 358, 358–59 (2007) (Fairfax County) (finding that action for single credit card debt filed in general district court, nonsuited, and refiled in circuit court for both original and an additional credit card debt was proper, despite added claim in circuit court and in-

In 1996, the Loudoun County Circuit Court, in *Spear v. Metropolitan Washington Airport Authority*, narrowly construed the requirement to refile the same cause of action after nonsuit by holding that a refiled action after a nonsuit that increased the original ad damnum clause of \$325,000 to \$500,000 was not the same case which was nonsuited, and did not constitute a “recommencement” of the plaintiff’s action in order to fall under the tolling provisions of section 8.01-229(E)(3).<sup>371</sup> *Spear* caused considerable anxiety among the plaintiff’s bar.<sup>372</sup> *Spear*’s validity could have been settled when the Supreme Court of Virginia granted an appeal of the case, but it never heard the case because the petition was withdrawn when the parties settled. *Spear*, however, was specifically considered and rejected in *O’Hearn v. Mawyer*.<sup>373</sup> The Supreme Court of Virginia does not appear to have yet expressly and definitively decided that an action refiled after nonsuit is entitled to the tolling provisions of section 8.01-229(E)(3) despite additions or changes in the causes of action alleged, or in the ad damnum clause, provided those causes of action arose out of the same transaction or occurrence as the nonsuited claims. The court has, however, come close enough in two decisions to expressing its support for that premise that it is not unreasonable to conclude that support exists.

The first of those decisions is *Conner v. Rose*, which held that it was permissible for a plaintiff who nonsuited his action in general district court to refile that action in circuit court, claiming damages in excess of the jurisdictional limits of the general district court.<sup>374</sup> *Conner*, however, was concerned with section 8.01-380(A), which prohibits new proceedings after a nonsuit on the same cause of action in any court other than that in which the

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creased ad damnum from \$10,521.45 in general district court to \$23,444.25 in circuit court). In *Dunston*, the court traced the demise of the “same evidence” test to determine whether claims are part of a single cause of action, and affirmed that the proper test in Virginia is whether the claims arise out of the same conduct, transaction or occurrence. *Dunston*, 709 F. Supp. 2d at 418–21; see also *Caperton v. A.T. Massey Coal Co., Inc.*, 285 Va. 537, 550, 740 S.E.2d 1, 8 (2013).

371. 78 Va. Cir. 456, 458 (2009) (Loudoun County).

372. See, e.g., Peter Vieth, *Nonsuit Dismissal Questioned by Virginia Plaintiff’s Bar*, VA. LAW. WKLY. (Aug. 24, 2009), <http://valawyersweekly.com/2009/08/24/nonsuit-dismissal-questioned-by-plaintiff-s-bar/>.

373. *O’Hearn v. Mawyer*, 80 Va. Cir. 11, 13 (2010) (Rockingham County) (holding that a refiled action met the test of section 8.01-229(E)(3) because it was part of the same set of operational facts as the nonsuited action).

374. *Conner v. Rose*, 252 Va. 57, 58, 471 S.E.2d 478, 479 (1990).

nonsuit was taken, unless that court is without jurisdiction.<sup>375</sup> *Conner* found the general district court to be without jurisdiction to hear the refiled action with the increased ad damnum clause, but the court was not concerned with whether the refiled action was the same cause of action nonsuited in general district court.<sup>376</sup> However, *Conner* may be legitimately construed as accepting, sub silentio, that the refiled action was the same as that nonsuited, and thus supporting the holdings in *Dunston*, *Herndon*, *Vaughn*, *Tasi*, and *O'Hearn*.<sup>377</sup>

The second of those decisions is *McKinney v. Virginia Surgical Associates, P.C.*, where the plaintiff administrator initially filed a wrongful death action and, after discovery, took a nonsuit.<sup>378</sup> The plaintiff subsequently filed a survival action more than two years after the defendant's alleged negligence occurred, but less than six months from her nonsuited wrongful death action.<sup>379</sup> In concluding that the refiled action was timely under the tolling provisions of section 8.01-229(E)(3), the Supreme Court of Virginia held that there was a single cause of action, and found that the survival action arose out of the same cause of action as her nonsuited wrongful death action.<sup>380</sup>

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375. *Id.*, 471 S.E.2d at 478.

376. *Id.*, 471 S.E.2d at 478–79.

377. *But see* *Stacy v. Mullins*, 185 Va. 837, 841, 40 S.E.2d 265, 266 (1946) (holding that “an appeal is a mere continuation of the original case . . . . [T]herefore . . . the power of amendment of the appellate court is limited to the highest sum which the court from which the appeal was taken was authorized to render judgment . . . .”) (citations omitted). *Conner v. Rose* did not discuss *Stacy v. Mullins*. However, *Davis v. County of Fairfax* discussed *Stacy* to emphasize that “the jurisdiction of the appellate court on appeal from the [general district court] is derivative,” meaning if the general district court had no jurisdiction the appellate court acquires none on appeal, and that “an appeal is a mere continuation of the original case,—a proceeding in the action.” *Davis v. Cnty. of Fairfax*, 282 Va. 23, 31, 710 S.E.2d 466, 469–70 (2011) (citations omitted); *see also* *Waller v. Anthony*, 16 Va. Cir. 132 (1989) (City of Richmond) (citations omitted). In *Waller*, the plaintiff appealed an adverse judgment in general district court to circuit court, where he obtained a nonsuit. *Id.* at 132. He then refiled his action, claiming damages in excess of the jurisdictional limits of the general district court. *Id.* The circuit court refused to permit the increased claim for damages. *Id.* at 133–34.

378. *McKinney v. Va. Surgical Assoc., P.C.*, 284 Va. 455, 458, 732 S.E.2d 27, 28 (2012).

379. *Id.*

380. *Id.* at 461, 732 S.E.2d at 29–30.

## VI. NONSUITS IN CASES APPEALED TO OR REFILED IN CIRCUIT COURT

Cases frequently move between general district court and circuit court. There are three avenues for this: (1) as a result of an *appeal* by the non-prevailing party;<sup>381</sup> (2) as a result of an *appeal* by the defendant after a nonsuit by the plaintiff;<sup>382</sup> or (3) as the result of a *refiling* of the case in circuit court by a plaintiff after nonsuiting in general district court, in which the ad damnum clause requests damages in excess of the general district court's jurisdictional limits.<sup>383</sup>

Where the plaintiff has obtained an appealable nonsuit in general district court, and the defendant appeals to circuit court, the plaintiff is nevertheless permitted to take a first nonsuit of right in circuit court.<sup>384</sup> Two earlier circuit court decisions reached an opposite conclusion;<sup>385</sup> however, they are not only inapposite to *Berry*, but to the nature of an appeal to the circuit court from a court not of record.

In an appeal to circuit court from a court not of record, the jurisdiction of the circuit court is entirely derivative—the judgment of the lower court is completely annulled and is not thereafter

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381. Appeals from general district court to circuit court are governed by VA. CODE ANN. § 16.1-106 (Repl. Vol. 2010). Prior to April 2007, a defendant could remove a case filed in general district court to circuit court if certain criteria were met pursuant to sections 8.01-127, -127.1 and -16.1-92 (the "Removal Statutes"). In 2007, the Removal Statutes were repealed. Act of Apr. 4, 2007, ch. 869, 2007 Va. Acts 2344, 2347 (codified in scattered sections of VA. CODE ANN. (Repl. Vol. 2007)).

382. As discussed in Part IX of this article, a defendant may appeal a nonsuit granted in general district court only when there is a dispute as to its propriety, since a nonsuit is normally not a final judgment for purposes of an appeal. See *McManama v. Plunk*, 250 Va. 27, 30-32, 458 S.E.2d 759, 761-62 (1995); *Sharman v. Gillepsie*, No. 0140-09-2, 2010 Va. App. LEXIS 47, at \*9-10 (Va. Ct. App. Feb. 9, 2010) (citations omitted).

383. *Conner v. Rose*, 252 Va. 57, 58, 471 S.E.2d 478, 479 (1996).

384. See *Berry v. F&S Fin. Mktg., Inc.*, 271 Va. 329, 335, 626 S.E.2d 821, 824 (2006) (holding that the circuit court to which the defendant had appealed properly permitted the plaintiff a nonsuit despite his having previously nonsuited in general district court—no issue of this possibly being a second nonsuit was ever raised).

385. See *Joseph v. Giant Food, Inc.*, 61 Va. Cir. 143, 148 (2003) (Fairfax County) (distinguishing, but impliedly agreeing with the holding in *Chatman v. Nowell's Auto & Truck Repair*, 37 Va. Cir. 232, 232 (1995) (Prince William County) (recognizing that there was no Virginia case directly on point, but holding that the "continuation of the original case theory" applicable to appeals to circuit court made plaintiff's motion for nonsuit in circuit court a second nonsuit, because it was after his nonsuit in general district court and required plaintiff to pay defendant's counsel \$700 in attorney's fees to proceed therewith)).

available for any purpose.<sup>386</sup> “Such an appeal is in effect a statutory grant of a new trial, in which the perfected appeal *annuls the judgment of the district court as completely as if there had been no previous trial.*”<sup>387</sup> The appeal is a trial de novo,<sup>388</sup> meaning a trial anew, and “grants to a litigant every advantage which would have been [available to the litigant] had the case been tried originally in [the circuit] court.”<sup>389</sup> Upon a trial de novo in circuit court “all rulings and judgments rendered by the general district court are completely null and void and of no legal consequence.”<sup>390</sup> A court which hears a case de novo acts not as a court of appeals, but as one exercising original jurisdiction.<sup>391</sup> When a de novo appeal is taken to the circuit court, it has no authority to review, affirm, or reverse the judgment of the lower court. It exercises no appellate jurisdiction, but is simply empowered to hold a new trial.<sup>392</sup> Such an appeal “vacate[s] the decision of the lower court as if it never occurred and provide[s] a new trial in the circuit court.”<sup>393</sup> This is why when there is an appeal to circuit court, a nonsuit obtained in general district court is entirely nullified and does not count as a first nonsuit if the plaintiff later nonsuits the action in circuit court.

While *Berry* did not cite any of the foregoing principles, it obviously applied them in permitting the plaintiff a nonsuit of right in circuit court after his earlier nonsuit in general district court. On

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386. See *Stacy v. Mullins*, 185 Va. 837, 842, 40 S.E.2d 265, 267 (1996) (citations omitted); *Addison v. Salyer*, 185 Va. 644, 650–51, 40 S.E.2d 260, 263 (1946) (citations omitted). In addition to *Stacy v. Mullins*, the derivative nature of the jurisdiction of the circuit court on appeal from a lower court is noted consistently. See, e.g., *Hoffman v. Stuart*, 188 Va. 785, 794, 51 S.E.2d 239, 244 (1949); *DeFelice v. Wool*, 17 Va. Cir. 13, 13 (1988) (Fairfax County). This concept is also characterized as a “continuation of the original case theory.” See *Hoffman*, 188 Va. at 794, 51 S.E.2d at 244; *Chatman*, 37 Va. Cir. at 232.

387. *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 327, 497 S.E.2d 740, 742 (1998) (emphasis added) (citation omitted); accord *Lewis v. Culpeper Cnty. Dep’t of Soc. Servs.*, 50 Va. App. 160, 167, 647 S.E.2d 511, 514 (2007).

388. VA. CODE ANN. § 16.1-106 (Cum. Supp. 2013).

389. *Fairfax Cnty. Dep’t of Family Servs. v. D.N. & S.N.*, 29 Va. App. 400, 406, 512 S.E.2d 830, 832 (1999) (emphasis added) (quoting *Walker v. Dep’t of Public Welfare*, 223 Va. 557, 563, 290 S.E.2d 887, 890 (1982)).

390. *Joseph*, 61 Va. Cir. at 146 (finding that although the case had been submitted to the general district court for decision, no bar to a first nonsuit of right in circuit court existed).

391. *Addison*, 185 Va. at 650, 40 S.E.2d at 263 (citing *Thomas Gemmill, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 184 S.E. 457, 458 (1936)).

392. *Berger v. Harris*, No. 1588-11-2, 2012 Va. App. LEXIS 172, at \*5 (Va. Ct. App. May 22, 2012) (citations omitted).

393. *Id.* (citations omitted),

the other hand, had the defendant in *Berry* not *appealed* the general district court decision to circuit court, and the plaintiff had chosen to *refile* his action there, and then sought a nonsuit, it would appear to have been a second nonsuit, permitted only by stipulation or the discretion of the circuit court. There do not appear to be any reported cases directly supporting that conclusion. However, unlike a de novo appeal, the *refiling* of a nonsuited general district court action in circuit court would not vacate or annul the judgment of the general district court and grant to the plaintiff “every advantage which would have been [available to the litigant] had the case been tried originally in [the circuit] court.”<sup>394</sup>

After a nonsuit in general district court, with no appeal, and a refiling of the action by the plaintiff in circuit court, the plaintiff is permitted to increase his ad damnum clause to claim damages in excess of the jurisdictional limits of the general district court.<sup>395</sup> The venue restrictions in section 8.01-380(A) do not prohibit this refiling in the circuit court, rather than in the general district court, because the ad damnum clause exceeds the general district court’s jurisdictional limits.<sup>396</sup>

Prior to 1997, when the defendant appealed an adverse judgment in general district court to circuit court, and the plaintiff attempted to then claim damages in excess of the jurisdictional limits of the general district court, he was prohibited from doing so by the principle that while the appeal was a de novo trial, the jurisdiction of the circuit court was derivative of the general district court.<sup>397</sup> However, amendments were permitted upon such an appeal, so long as the jurisdictional limits of the general district court were not exceeded.<sup>398</sup> Then, in 1997, Virginia Code section 16.1-114.1 was amended to provide that in “any case where

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394. *D.N. & S.N.*, 29 Va. App. at 406, 512 S.E.2d at 832 (quoting *Walker*, 223 Va. at 563, 290 S.E.2d at 890) (alterations in original).

395. *Conner v. Rose*, 252 Va. 54, 58, 471 S.E.2d 478, 478–79 (1996).

396. *Id.*; *accord* *Richardson v. Fleetwood Homes, Inc.*, 37 Va. Cir. 215, 215–16 (1995) (Rockingham County); *White v. Southland Corp.*, 3 Va. Cir. 97, 97–98 (1983) (Alexandria City).

397. *See Stacy v. Mullins*, 185 Va. 837, 843–44, 40 S.E.2d 265, 267–68 (1946) (citations omitted).

398. *Copperthite Pie Corp. v. Whitehurst*, 157 Va. 480, 487, 162 S.E. 189, 191 (1932); *DeFelice v. Wool*, 17 Va. Cir. 13, 15 (1988) (Fairfax County); *Fed. Real Estate & Invest. Corp. v. Carl Frye’s Mobile Home & Modular Housing, Inc.*, 5 Va. Cir. 11, 12–13 (1980) (Frederick County).

an appeal is taken *by a defendant* the circuit court may direct amendments to increase the amount of the claim above the jurisdictional amount set forth in section 16.1-77,” which defines the jurisdictional limits of the general district court.<sup>399</sup> This amendment, however, is applicable only to an appeal by the *defendant*. When the plaintiff is the appellant, the 1997 amendment to section 16.1-114.1 does not apply, and *Stacy v. Mullins* governs.<sup>400</sup>

Where there has been no nonsuit in general district court and an appeal is taken to circuit court by either the plaintiff or defendant, and the plaintiff nonsuits there, that nonsuit does not deprive the circuit court of its derivative appellate jurisdiction. Thus, if such plaintiff chooses to refile his action he must do so in circuit court.<sup>401</sup> If he improperly refiles in general district court, that court has no jurisdiction to hear the refiled action.<sup>402</sup> In such a case, if the general district court properly decides it has no subject matter jurisdiction to hear such improperly refiled action, and that decision is appealed to the circuit court, the latter is without jurisdiction to hear the appeal.<sup>403</sup>

## VII. SANCTIONS IN THE CONTEXT OF A NONSUIT

No sanctions under section 8.01-271.1 may be imposed merely for taking a nonsuit.<sup>404</sup> Moreover, a plaintiff cannot be otherwise penalized for obtaining a nonsuit of right. Thus, the granting of a nonsuit to the plaintiff does not make the defendant the “prevailing party” under a contractual provision entitling the prevailing party to an award of reasonable attorney’s fees.<sup>405</sup>

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399. Act of Mar. 22, 1997, ch. 753, 1997 Va. Acts 1803, 1804 (codified in scattered sections of VA. CODE ANN. (Cum. Supp. 1998)) (emphasis added).

400. See *Mills v. Orkin Exterminating Co.*, 46 Va. Cir. 230, 230 (1998) (Spotsylvania County).

401. *Waller v. Anthony*, 16 Va. Cir. 132, 135 (1989) (City of Richmond).

402. *Davis v. Cnty. of Fairfax*, 282 Va. 23, 30–31, 710 S.E.2d 466, 469 (2011).

403. *Id.* at 31, 710 S.E.2d at 470 (citations omitted) (noting that the circuit court’s appellate jurisdiction is derivative of the general district court’s jurisdiction).

404. *Breckner v. Hallen*, 36 Va. Cir. 79, 81 (1995) (Spotsylvania County); *Warf v. Fields*, 33 Va. Cir. 1, 4 (1993) (Loudoun County); *Becon Servs., Inc. v. Hazel Indus., Inc.*, 33 Va. Cir. 554, 558 (1992) (Loudoun County); *Lankford v. Moore’s Marine, Inc.*, 22 Va. Cir. 295, 297 (1990) (City of Richmond).

405. *Sheets v. Castle*, 263 Va. 407, 414, 559 S.E.2d 616, 620 (2002) (“[T]here is no ‘prevailing’ party when a nonsuit is awarded.”).

The principle that a plaintiff taking a first nonsuit of right will not be penalized therefor was also followed in *Montgomery v. McDaniel*, an abuse of process action in which the plaintiff argued that the defendant's nonsuiting his cross-bill against her, rather than dismissing it with prejudice, was evidence of his intent to use it as a future threat, which amounted to coercion, satisfying the second element of the tort of abuse of process, defined as "an act in the use of the process not proper in the regular prosecution of the proceedings."<sup>406</sup> The Supreme Court of Virginia rejected that argument, noting that adopting it would render many nonsuits an improper use of process under the abuse of process analysis because a first nonsuit carries with it the right to refile the litigation in the future, provided the other statutory requirements are met, and the limitations period(s) have not expired.<sup>407</sup> The court expressly held that "[e]xercising the statutory right to take a nonsuit knowing that, by statute, the litigation can be refiled does not qualify as 'an act in the use of process not proper in the regular prosecution of the proceedings.'"<sup>408</sup>

While the request for, or the taking of, a nonsuit may not itself be the basis for sanctions, the Virginia Court of Appeals has upheld the trial court's imposition of sanctions under Virginia Code section 8.01-271.1, which were imposed under circumstances in which it appeared that the sanctionable conduct by a husband in a custody dispute included an attempted nonsuit of his appeal from Juvenile and Domestic Relations court just days before the scheduled trial in circuit court.<sup>409</sup> The circuit court rejected the attempted nonsuit and determined, inter alia, that the husband vindictively pursued his fruitless litigation and used his pending appeal as leverage in offering a settlement to the wife, knowing the burdensome impact his litigation was having on her.<sup>410</sup> Neither the circuit court nor the Virginia Court of Appeals utilized the husband's attempted nonsuit as the express basis for the sanctions. However, the court of appeals' decision implies that the circumstances surrounding the seeking of the nonsuit factored in-

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406. *Montgomery v. McDaniel*, 271 Va. 465, 470, 628 S.E.2d 529, 532 (2006).

407. *Id.*

408. *Id.* (quoting *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 235 Va. 531, 539, 369 S.E.2d 857, 862 (1988)).

409. *See Ottosen v. Saunders*, No. 0953-05-4, 2005 Va. App. LEXIS 484, at \*3, \*6 (Va. Ct. App. Dec. 6, 2005).

410. *Id.* at \*5-6.

to the sanction imposition and affirmance.<sup>411</sup> Prudent counsel should, therefore, be concerned that the circumstances surrounding a request for nonsuit do not form part of a larger pattern of litigation conduct which could persuade a court to impose sanctions therefor under section 8.01-271.1.

The entry of an order of nonsuit may properly be delayed to permit the court to hear and decide a motion for sanctions against the plaintiff for *prior* conduct warranting such action.<sup>412</sup> One circuit court has held that even if a nonsuit order has been entered and become final, the trial court can *enforce* a sanctions order issued prior to the entry of the nonsuit order.<sup>413</sup> *Heishman* distinguished *James v. James*, where the court found that the trial court lacked jurisdiction to initially issue a contempt order more than twenty-one days after entry of nonsuit orders. *Heishman* construed *James* as addressing a trial court's ability *to issue* sanctions, not its ability *to enforce* a previously issued sanctions award.<sup>414</sup> *Heishman* considered the latter, consistent with *Eddens*, to be authorized because it is ancillary to and in support of the previously issued award.<sup>415</sup>

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411. *Id.*

412. See *Rockingham Petroleum Co-Op, Inc. v. Distrib. Servs., Inc.*, 63 Va. Cir. 99, 101 (2003) (Rockingham County) (sanctioning plaintiff's attorney who continuously promised to nonsuit case after filing suit against the wrong defendant, but who failed to do so for over a year, despite ultimate grant of nonsuit to plaintiff); *Morrissey v. Jennings*, 60 Va. Cir. 179, 183 (2002) (City of Richmond) ("A plaintiff cannot file a frivolous lawsuit, require a defendant to expend money and time to respond, and then escape sanctions simply by taking a nonsuit."); *Sawyer v. Jarrett*, 36 Va. Cir. 436, 437 (1995) (Spotsylvania County) ("A litigant cannot avoid sanctions under Rule 4:12 simply by taking a nonsuit before the court can act on the defendant's request for such sanctions."); accord *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 389 (1990) (voluntary dismissal is no bar to sanctions under Federal Rule of Civil Procedure 11); cf. *Chatman v. Nowell's Auto & Truck Repair*, 37 Va. Cir. 232, 232 (1995) (Prince William County); *Lazarus v. Thomas*, 33 Va. Cir. 457, 459 (1994) (Loudoun County) (allowing the option of sanctions in general but denying it based on the circumstances); *Winchester Homes, Inc. v. Hoover Univ., Inc.*, 30 Va. Cir. 22, 22 (1992) (Fairfax County); *Miller v. Moore*, 29 Va. Cir. 339, 339 (1992) (Fauquier County); *Lewis v. Lambert*, 26 Va. Cir. 109, 109 (1991) (City of Richmond); *Cnty. Bank & Trust Co. of Va. v. Turk*, 20 Va. Cir. 378 (1990) (Loudoun County).

413. *Heishman, Inc. v. Fox Television Stations, Inc.*, 59 Va. Cir. 325, 327 (2002) (Arlington County) (citing *Eddens v. Eddens*, 188 Va. 511, 521-22, 50 S.E.2d 397, 402 (1948)) (arguing the court has inherent power to impose sanctions post-nonsuit to enforce its previously issued sanctions order).

414. Compare *id.*, with *James v. James*, 263 Va. 474, 484, 562 S.E.2d 133, 139 (2002).

415. *Heishman, Inc.*, 59 Va. Cir. at 327. *Eddens* demonstrated that the finality of a decree or order, entered more than twenty-one days earlier, does not necessarily bar the imposition of sanctions in all circumstances. It recognized the inherent power of a court to punish a party through a contempt proceeding for a willful refusal to obey a lawful decree

*James* was further clarified in *Williamsburg Peking Corporation v. Kong*, which upheld the authority of a trial court to consider and act upon a motion for sanctions that is pending when a plaintiff moves for a first nonsuit.<sup>416</sup> *Kong* makes clear that *James* only affirmed that an order granting a nonsuit should be subject to the provisions of Supreme Court of Virginia Rule 1:1; *James* did not preclude a court that has granted a nonsuit from subsequently granting a pending motion for sanctions *within* twenty-one days after the entry of the nonsuit order.<sup>417</sup> *Kong*, *James*, *Eddens*, and *Heishman* addressed the question of sanctions imposed in a civil action following entry of a nonsuit. A separate question is whether a nonsuit entered in a civil case can be followed by a finding of criminal contempt against the plaintiff's attorney for his actions in the prior case. The Court of Appeals answered that question in the affirmative in *Brown v. Commonwealth*.<sup>418</sup>

Consistent with *Kong* and *James*, sanctions in the context of a nonsuit must comply with the provisions of Rule 1:1. As discussed in Part IX, even though no dispute exists as to whether a nonsuit has been properly granted—so that the nonsuit order does not constitute a final judgment for appeal purposes—every nonsuit order is sufficiently imbued with the attributes of finality to satisfy the requirements of Rule 1:1.<sup>419</sup> The court in *James* relied on that reasoning to hold that the trial court lacked jurisdiction to enter an order finding a mother in contempt for violating a discovery order when the contempt order was issued more than

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of divorce entered ten years earlier, because the rule to show cause was “ancillary to and in support of the divorce suit and its decrees.” *Eddens*, 188 Va. at 521–22, 50 S.E.2d at 402. In *James*, once the nonsuit orders had become final upon expiration of the twenty-one days prescribed in Rule 1:1, there was nothing to which a rule to show cause would become ancillary, or of which it could be supportive as, at that point, no outstanding obligation of the plaintiff's existed. *James*, 263 Va. at 484, 562 S.E.2d at 139. However, the Supreme Court of Virginia has held that once the twenty-one day time period of Rule 1:1 has expired, “the trial court is thereafter *without jurisdiction* in the case.” *N. Va. Real Estate, Inc. v. Martins*, 283 Va. 86, 104, 720 S.E.2d 121, 130 (2012) (emphasis added) (citing *Super Fresh Food Mkts. of Va. v. Ruffin, Inc.*, 263 Va. 555, 563–64, 561 S.E.2d 734, 739 (2002)). If a court is without jurisdiction, does it matter that it wishes to enforce a previously issued sanction award, rather than initially issuing the award? Is the enforcement authority recognized in *Heishman* limited to Rule 1:1's twenty-one day period?

416. 270 Va. 350, 355, 619 S.E.2d 100, 102–03 (2005).

417. *Id.* (“[W]here, as here, a motion for sanctions . . . is pending when a plaintiff moves for a first nonsuit, the trial court is empowered to consider the sanctions motion either before the entry of the nonsuit order or within 21 days after the entry of the nonsuit order.”).

418. 26 Va. App. 758, 762, 497 S.E.2d 147, 149 (1998).

419. *James*, 263 Va. at 481, 562 S.E.2d at 137.

twenty-one days after entry of the mother's two nonsuit orders, and the trial court's order requiring the mother to appear and show cause why she should not be held in contempt did not vacate or suspend the latter.<sup>420</sup> "[F]rom its very nature, an order granting nonsuit should be subject to the provisions of Rule 1:1, with or without the existence of a dispute over the propriety of granting the nonsuit."<sup>421</sup> The Richmond City Circuit Court had arrived at the same conclusion twelve years earlier in *Chandler v. Signet Bank/Virginia*.<sup>422</sup>

For the trial court to retain jurisdiction in excess of twenty-one days after the entry of a nonsuit order, whether to impose sanctions or for other purposes, the nonsuit order must *expressly* provide that the court retains jurisdiction. Otherwise, the nonsuit order triggers the mandatory running of the twenty-one day period prescribed by Rule 1:1.<sup>423</sup> The order in *Martins* read that "[T]his Order is SUSPENDED until further order of this Court."<sup>424</sup> This was ineffective to prevent the running of Rule 1:1's twenty-one day period because it merely expressed the trial court's *intention* to retain jurisdiction over the case.<sup>425</sup>

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420. The running of time under Rule 1:1 may be interrupted only by the entry, within the twenty-one day period after final judgment, of an order modifying, suspending, or vacating the final order. *Id.* at 482, 562 S.E.2d at 137 (citing Berean Law Group, P.C. v. Cox, 259 Va. 622, 626, 528 S.E.2d 108, 111 (2000)); *see also* Super Fresh Food Mkts. of Va., Inc. v. Ruffin, Inc., 263 Va. 86, 559, 561 S.E.2d 121, 736 (finding order entered within twenty-one days of final judgment, and stating that the trial court "shall retain jurisdiction" over action until it ruled on motion to reconsider ineffective to extend trial court's jurisdiction). Neither the filing of post-trial or post-judgment motions, nor the trial court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment is sufficient to toll or extend the running of the twenty-one day period prescribed by Rule 1:1. *James*, 263 Va. at 482–83, 562 S.E.2d at 138; *Berean Law Group*, 259 Va. at 626, 528 S.E.2d at 111.

421. *James*, 263 Va. at 481, 562 S.E.2d at 137.

422. 20 Va. Cir. 447, 450 (1990) (City of Richmond).

423. "The provisions of Rule 1:1 are mandatory . . ." *Super Fresh Food Mkts. of Va., Inc.*, 263 Va. at 563, 561 S.E.2d at 739. *But see* N. Va. Real Estate, Inc. v. Martins, 283 Va. 86, 104, 720 S.E.2d 121, 130 (2012) (citations omitted) ("[O]nly an order within the twenty-one day time period that clearly and expressly modifies, vacates, or *suspends* the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case."); *Johnson v. Woodard*, 281 Va. 403, 409–10, 707 S.E.2d 325, 328 (2011) ("[A] circuit court may avoid the application of the 21 day time period in Rule 1:1 by including specific language stating that the court is retaining jurisdiction to address matters still pending before the court.").

424. *Martins*, 283 Va. at 104, 720 S.E.2d at 130.

425. *See* *Washington v. Commonwealth*, No. 1002-06-4, 2007 Va. App. LEXIS 278, at \*10 (Va. Ct. App. July 4, 2007) (noting that the judge's intention to continue the matter and review it in another sixty days did not revoke or modify a previously issued final order

The strictness of Rule 1:1 is illustrated by language in *City of Suffolk v. Lummis Gin Co.*, which reads

[n]either the filing of post-trial or post-judgment motions, nor the trial court's taking such motions under consideration, nor the pendency of such motions in the twenty-first day after final judgment, is sufficient to toll or extend the running of the 21-day period permitted by Rule 1:1.<sup>426</sup>

The order in *City of Suffolk* read that “[t]his suit shall remain on the docket for the court to determine issues concerning attorney fees, costs, and expenses incurred by [certain defendants].”<sup>427</sup> However, that language was insufficient to toll the running of Rule 1:1’s time period.

Despite the absence of an effective modification, vacation, or suspension of a nonsuit order, where a motion for sanctions is pending when the plaintiff first moves for a nonsuit, the trial court is empowered to consider the sanctions motion either before the entry of the nonsuit order or within twenty-one days after entry of that order.<sup>428</sup> Moreover, where a nonsuit order is vacated within twenty-one days of its entry, the trial court is free to consider the plaintiff’s motion for sanctions.<sup>429</sup> Examples of nonsuit orders which were effective to suspend the running of twenty-one day periods prescribed by Rule 1:1 include the following:<sup>430</sup>

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and did not extend Rule 1:1’s twenty-one day period); *Carrithers v. Harrah*, 60 Va. App. 69, 75, 723 S.E.2d 638, 640 (2012) (“A mere indication that the trial court *intends* to rule on pending motions is insufficient to negate the finality of an order rendering a final judgment on the merits of the case.”); *see also Super Fresh Markets of Virginia, Inc.*, 263 Va. at 562–63, 561 S.E.2d at 738–39 (finding that an order stating that the trial court shall “retain jurisdiction” to consider and rule on a motion for reconsideration was insufficient to counteract the strictures of Rule 1:1).

426. 278 Va. 270, 277, 683 S.E.2d 549, 552 (2009) (quoting *James*, 263 Va. at 482–83, 562 S.E.2d at 138).

427. *Id.*, 683 S.E.2d at 553.

428. *Williamsburg Peking Corp. v. Kong*, 270 Va. 350, 355, 619 S.E.2d 100, 102–03 (2005).

429. *Lewis v. Lambert*, 26 Va. Cir. 109, 109 (1991) (City of Richmond).

430. A nonsuit case involving sanctions that appears to have been wrongly decided in violation of Rule 1:1 was *Sawyer v. Jarrett*, 36 Va. Cir. 436 (1995) (Spotsylvania County). The trial court entered a nonsuit order on May 18, 1995, and entered sanctions against the plaintiff on June 14, 1995, granting defendant’s motion for sanctions filed prior to the nonsuit. *Id.* at 437. Thus, the sanctions order was apparently issued some twenty-seven days after entry of the nonsuit order, and there was no indication that the court ever entered an order suspending or vacating the nonsuit order, or retaining jurisdiction to consider the sanctions motion. *See id.*

(1) “The Motion [] to Nonsuit is granted, and this case is dismissed as to all counts and all parties; and it is further ADJUGED, ORDERED, and DECREED that *this Order is SUSPENDED until further order of this Court.*”<sup>431</sup>

(2) “[T]he [appellee’s] action is hereby non-suited without prejudice; this order does not preclude any hearing on any pending motion for sanctions or similar relief. . . . AND THIS CAUSE IS FINAL CONTINUED.’ The trial court struck through the word ‘final’ twice and hand-wrote in ‘continued.’”<sup>432</sup>

Other examples of orders effective to suspend the running of the twenty-one day period prescribed in Rule 1:1, albeit not involving a nonsuit order:

(1) It is ORDERED that the final Order be suspended for fourteen (14) days from this date. This tolls the running of the twenty-one (21) day provision in Rule 1:1, thus allowing a total of thirty-five (35) days for entry of an Amended Final Order.<sup>433</sup>

(2) By order of February 10, 1994, the trial court denied [the plaintiffs] motion for leave to amend their bill, and stated that it would “retain jurisdiction” over the [defendant’s] request for sanctions. On March 31, 1994 . . . the trial court entered its last order in the case, in which it granted the [] motion for sanctions and entering judgment against [plaintiffs] and their attorneys. . . .<sup>434</sup>

### VIII. THE EXTENT TO WHICH NONSUIT IS AN “ABSOLUTE” RIGHT

Overarching the foregoing common law and statutory principles is the issue of whether nonsuit in Virginia is an “absolute right” of a plaintiff. The nonsuit statute, Virginia Code section 8.01-380(B), authorizes one nonsuit to a cause of action or against a party to the proceeding “as a matter of right,” but significantly, it does not characterize that right as “absolute.”<sup>435</sup> The Supreme Court of Virginia has been somewhat ambivalent in its characterization of nonsuit as being an “absolute” right. In *Bremer v. Doctor’s Building Partnership*, the court recognized that there are

431. N. Va. Real Estate, Inc. v. Martins, 283 Va. 86, 104, 720 S.E.2d 121, 130 (2012).

432. Gerensky-Greene v. Gerensky, No. 1801-11-4, 2012 Va. App. LEXIS 206, at \*5–6 (Va. Ct. App. June 19, 2012).

433. Hutchins v. Talbert, 278 Va. 650, 652, 685 S.E.2d 658, 659 (2009).

434. Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick, 249 Va. 320, 332, 455 S.E.2d 712, 718–19 (1995).

435. See *supra* Part V.B (discussing whether nonsuit is currently an entirely statutory right).

“conditions attaching to a nonsuit.”<sup>436</sup> While the court acknowledged that “a plaintiff is entitled to one nonsuit as a matter of right,”<sup>437</sup> it eschewed the characterization of “absolute” right. Seven months earlier, however, in *McManama v. Plunk*, the court noted that the nonsuit statute gives “a party the absolute right to one voluntary nonsuit,” albeit it recognized that the statute “contains a number of limitations on that right.”<sup>438</sup> These limitations are strictly limited to those imposed by section 8.01-380. A court is not authorized to impose any limitations on the tactical use of the absolute right of a plaintiff to take a first nonsuit of right beyond those found in the statute.<sup>439</sup> Other Virginia cases likewise contain language characterizing the plaintiff’s “right” to nonsuit as “absolute,” but with some caveats.<sup>440</sup> However, a number of Virginia cases simply recognize the “right” to nonsuit and, like section 8.01-380(B), significantly do not characterize the right as “absolute.”<sup>441</sup> Indeed, in *J.I. Case Co. v. United Virginia Bank*, the Supreme Court of Virginia pointedly referred to the “statutory nonsuit privilege,”<sup>442</sup> and *Board of Supervisors v. Proffit* appears

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436. *Bremer v. Doctor’s Bldg. P’ship*, 251 Va. 74, 80, 465 S.E.2d 787, 790 (1996); see also *Bivens v. Hyatt*, 6 Va. Cir. 447, 449 (1969) (City of Norfolk) (commenting that these are “very limited exceptions”).

437. *Bremer*, 251 Va. at 81, 465 S.E.2d at 791.

438. *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995); see also *James v. James*, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002).

439. See *Simmons v. MTD Prods., Inc.*, 75 Va. Cir. 63, 70 (2008) (City of Roanoke).

440. See, e.g., *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984) (noting that if the plaintiff insists upon taking a nonsuit of right “within the limitations imposed by the statute,” neither the trial court nor opposing counsel can prevent him); see also *Wells v. Lorcom House Condo. Council*, 237 Va. 247, 251, 377 S.E.2d 381, 383 (1989) (noting that the nonsuit statute “contains a number of limitations on a party’s right to take a voluntary nonsuit”); *Moore v. Moore*, 218 Va. 790, 794, 240 S.E.2d 535, 537 (1978) (discussing the pre-1954 absolute right to dismiss a chancery suit before final decree “unless affirmative rights of the defendant or others had attached”); *Clark v. Clark*, 11 Va. App. 286, 297, 398 S.E.2d 82, 88 (1990). A number of circuit court decisions have characterized plaintiff’s right to one nonsuit as “absolute.” See, e.g., *Plinkington v. NVC of Vienna, Inc.*, 51 Va. Cir. 147, 149 (1999) (Fairfax County); *Taylor v. Vance*, 48 Va. Cir. 381, 382 (1999) (Fairfax County); *Allen v. Taylor*, No. LC-2486-1, 1998 Va. Cir. LEXIS 432, at \*3 (Va. Cir. Ct. Sept. 4, 1998) (City of Richmond); *Breckner v. Hallen*, 36 Va. Cir. 79, 80 (1995) (Spotsylvania County).

441. See, e.g., *Lee Gardens Arlington Ltd. P’ship v. Arlington City Bd.*, 250 Va. 534, 541, 463 S.E.2d 646, 649 (1995); *Trout v. Commonwealth Transp. Comm’r of Va.*, 241 Va. 69, 73, 400 S.E.2d 172, 173–74 (1991); *City of Roanoke v. Cnty. of Roanoke*, 214 Va. 216, 229–30, 198 S.E.2d 780, 790 (1973); *City of Norfolk v. Cnty. of Norfolk*, 194 Va. 716, 723–24, 75 S.E.2d 66, 70 (1953); *Bd. of Supervisor v. Proffit*, 129 Va. 9, 16–17, 105 S.E. 666, 668 (1921); *Harrison v. Clemens*, 112 Va. 371, 373–74 (1911), 71 S.E. 538, 538–39 (1911).

442. *J.I. Case Co. v. United Virginia Bank*, 232 Va. 210, 214, 349 S.E.2d 120, 123 (1986) (emphasis added).

to recognize a “good faith” requirement to the voluntary abandonment of proceedings which a party has instituted.<sup>443</sup> Moreover, in *Patterson v. Old Dominion Trust Co.*, the Supreme Court of Appeals quoted, with approval, from 18 Corpus Juris 1148: “Plaintiff has no absolute right at all times and under all circumstances to discontinue, dismiss or take a nonsuit.”<sup>444</sup> This quote from *Patterson* most accurately states the substantive status of Virginia law.<sup>445</sup> While a Virginia plaintiff has a statutorily recognized right to one nonsuit, it is certainly not “absolute.” That right is materially circumscribed by the stage of the trial at which nonsuit is sought, and by the existence of a nonindependent counterclaim, cross-claim, or third-party claim. The right to that one nonsuit is “absolute” only to the extent that the Virginia trial court has no judicial discretion to deny it to the plaintiff,<sup>446</sup> provided that none of the non-discretionary statutory bars to nonsuit

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443. *Proffit*, 129 Va. at 14, 105 S.E. at 667.

444. *Patterson v. Old Dominion Trust Co.*, 139 Va. 246, 258, 123 S.E. 549, 552 (1924) (quoting 18 C.J. *Dismissal and Nonsuit* § 5 (1912)); see also *Nelson v. Devnev*, 102 F.2d 481, 491 (7th Cir. 1939) (applying Wisconsin law); *Mistretta v. S.S. Ocean Evelyn*, 250 F. Supp. 868, 869–70 (E.D.N.Y. 1966); *Rozen v. Grattan*, 369 S.W.2d 882, 885 (Mo. Ct. App. 1963); *State ex rel. Butte-L.A. Mining Co. v. Dist. Ct. of Second Jud. Dist.*, 61 P.2d 828, 829 (Mont. 1936); *DehaRoyde v. Lovelace*, 49 P.2d 253, 255 (N.M. 1935); *Parnell v. Powell*, 3 S.E.2d 801, 802 (S.C. 1939); *Renfroe v. Johnson*, 177 S.W. 2d 600, 602 (Tex. 1944).

445. See *Ford Motor Co. v. Jones*, 266 Va. 404, 406–07, 587 S.E.2d 579, 580–81 (2003) (“A plaintiff’s right to take a nonsuit . . . is not unlimited.”) (citing *Dalloul v. Agbuy*, 255 Va. 511, 514, 499 S.E.2d 279, 281 (1998)).

446. As previously discussed, such discretion does exist for a second or additional nonsuit. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013). Moreover, in federal courts, and in the states with statutes which parallel Federal Rules of Civil Procedure 41(a), voluntary dismissal is by judicial discretion, unless by stipulation of all parties, or where taken before service of the defendant’s answer or a motion for summary judgment, whichever occurs first. Bearing on the issue of what, if any, discretion a Virginia trial court possesses regarding nonsuit, the Supreme Court of Virginia refused to uphold a writ of prohibition issued by a circuit court against a general district court which conditioned a landlord’s right to nonsuit unlawful detainer actions upon repayment to tenants of attorney’s fees paid in connection with the suits. *Elliott v. Great Atlantic Mgmt. Co.*, 236 Va. 334, 339, 374 S.E.2d 27, 30 (1988). However, since a writ of prohibition does not lie to prevent a lower court from adjudicating erroneously, *Elliott* provides no authority for a trial court to impose discretionary conditions upon a plaintiff’s right to nonsuit. See *supra* notes 99–100, 218–23 and accompanying text. But see *J.I. Case Co.*, 232 Va. at 215–16, 349 S.E.2d at 124 (authorizing a trial court in a detinue action to both award the plaintiff nonsuit, and to enter a money judgment for the defendant who suffers damages when the plaintiff decides to “manipulate the statutory scheme” by placing the seized property beyond the jurisdiction of the trial court before the rights of the parties have been determined).

then exist.<sup>447</sup> Indeed, a recent Supreme Court of Virginia decision notably did not describe a first nonsuit as an “absolute” right.<sup>448</sup>

Not only is the “absolute” right to one nonsuit constrained by the non-discretionary statutory bars thereto, but a nonsuit plaintiff *may* have certain obligations of prior notice to the defendant before obtaining a nonsuit of right. In *Fish v. Fitness Quest, Inc.*, the plaintiff sued three defendants.<sup>449</sup> Without notice to the third defendant, who was potentially obligated to pay any judgment against the other two by virtue of an indemnification agreement, the plaintiff scheduled a hearing on a motion for a default judgment against the other two defendants.<sup>450</sup> After obtaining the default, the plaintiff contacted the court *ex parte*, and without notice to the third defendant, scheduled a hearing on damages, immediately before which the third defendant was nonsuited.<sup>451</sup> When the court learned of these facts it set aside both of the default judgments on the ground of fraud on the court, since the nonsuited defendant did not have the opportunity to present a defense on behalf of the other two defendants to which it owed an indemnification obligation, or to take steps to ensure a default judgment was not procured, or to present a challenge to the amount of damages once a default was entered.<sup>452</sup>

*Fish*, which involved an initial nonsuit of right, may well be limited to its facts, if indeed it has any validation on the issue of lack of notice. As previously discussed in the lead-in portion of Part V of this article, in the case of an initial nonsuit of right, the

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447. Whatever the nature of the right to a nonsuit, a plaintiff has no absolute right to withdraw a nonsuit. *See supra* note 128. Withdrawal of a nonsuit requires a motion to the court, the grant or denial of which is discretionary. *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984). That discretion will normally be exercised to deny such withdrawal when, after plaintiff's counsel has announced his intention to nonsuit the case, the jury has been dismissed, witnesses have been excused, or other inconvenience would result from the grant of a motion of withdrawal. *Id.* The plaintiff may also request to withdraw a nonsuit after the court has orally granted nonsuit, but before a final written order of nonsuit is entered. *Richardson v. Hall*, 26 Va. Cir. 349, 351 (1992) (Wise County).

448. *See Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 344–46, 732 S.E.2d 703, 707–08 (2012) (describing the taking of one nonsuit only as “a matter of right,” a “procedural . . . right,” a “specific practice,” and a “method” to voluntarily dismiss the suit up until a specified time in the proceeding).

449. *Civil Practice: Default Judgment & Fraud on Court*, VA. LAW. WKLY., July 2, 2001, at 11 (summarizing *Fish v. Fitness Quest*, No. 190833, VLW 001-8-163 (Va. Cir. Ct. May 25, 2001) (Fairfax County) (unpublished decision)).

450. *Id.*

451. *Id.*

452. *Id.*

Supreme Court of Virginia has held that no notice to the defendant is required.<sup>453</sup>

### IX. APPEALABILITY OF ORDER GRANTING NONSUIT

Ordinarily, an order of nonsuit is not to be considered a final judgment for purposes of appeal.<sup>454</sup> An order of nonsuit is a final, appealable order within the meaning of Virginia Code section 8.01-670(A)(3) only when a dispute exists whether the trial court properly granted a motion for nonsuit.<sup>455</sup> Thus, when an order of nonsuit improperly dismisses a party defendant against whom a valid cross-claim has been filed, effectively time-barring the cause of action set forth in the cross-claim, such order is a final, appealable judgment as to the cross-claimant, within the meaning of section 8.01-670(A)(3).<sup>456</sup>

As previously discussed, when a nonsuit order entered by the trial court is appealed, the trial court's order is subject to change. If and when the trial court's order is affirmed by the Supreme Court of Virginia, the date the trial court subsequently enters the supreme court's mandate "as its own" order becomes the date of the nonsuit for purposes of the six-month tolling provision of section 8.01-229(E)(3).<sup>457</sup>

### X. MISCELLANEOUS ASPECTS OF VIRGINIA NONSUIT PRACTICE

Nonsuit practice in Virginia has a number of miscellaneous aspects which do not neatly fall under any of the subparagraphs of Virginia Code section 8.01-380. Among those aspects are the following.

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453. See *supra* Parts V.B & V.D; see also *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 761–62 (1995) (rejecting the defendant's contention that lack of notice deprived him of a protected property interest, and permitting an initial nonsuit); *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001) (finding nonsuit proper even though the defendant was not aware of its grant).

454. *Malloy v. Taylor*, 90 Va. 348, 349, 18 S.E. 438, 439 (1893).

455. See *McManama*, 250 Va. at 30–32, 458 S.E.2d at 761–62 (citing *Wells v. Lorcom House Condo. Council*, 237 Va. 247, 251, 377 S.E.2d 381, 383 (1989)); see also *Wilby v. Gostel*, 265 Va. 437, 443–44, 578 S.E.2d 796, 799–800 (2003); *Swann v. Marks*, 252 Va. 181, 184–85, 476 S.E.2d 170, 172 (1996).

456. *Iliff v. Richards*, 221 Va. 644, 649–50, 272 S.E.2d 645, 648 (1980).

457. *Phipps v. Liddle*, 267 Va. 344, 346–47, 593 S.E.2d 193, 194–95 (2004).

- (1) Where a nonsuit order is merely voidable and not void ab initio, it must be challenged by the defendant within the 21-day period of Rule 1:1 of the Supreme Court of Virginia Rules.<sup>458</sup>
- (2) Nonsuit provides a remedy when a medical malpractice plaintiff is unable to obtain the expert opinion required by Virginia Code section 8.01-20.1.<sup>459</sup>
- (3) An attorney has the general implied authority to nonsuit a client's case, so long as the nonsuit does not prevent bringing another suit on the same merits.<sup>460</sup>
- (4) An order of nonsuit provides sufficient notice that a case in state court has become removable to federal court, within the contemplation of the second paragraph of 28 U.S.C. section 1446(b).<sup>461</sup>
- (5) The timeliness of a notice of removal to federal court under 28 U.S.C. section 1446(b) is tied to Virginia nonsuit law. For purposes of the removal statute, when a plaintiff refiles a new suit on the same cause of action the plaintiff has previously nonsuited in a Virginia court, the plaintiff begins a new proceeding, and the pleading in the refiled action is the "initial pleading" under 28 U.S.C. section 1446(b), governing the time for filing a notice of removal thereof.<sup>462</sup>
- (6) Forcing a plaintiff to "burn" its nonsuit of right by unreasonably opposing a motion for continuance warrants sanctions.<sup>463</sup>
- (7) Res judicata and collateral estoppel do not apply to nonsuit.<sup>464</sup>

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458. *Singh v. Mooney*, 261 Va. 48, 51–53, 541 S.E.2d 549, 551–52 (2001).

459. *Bowman v. Concepcion*, 283 Va. 552, 564, 722 S.E.2d 260, 267 (2012).

460. *Snyder-Falkinham v. Stockbrugger*, 249 Va. 376, 382, 457 S.E.2d 36, 39 (1995) (citing *Va. Concrete Co. v. Bd. of Supervisors*, 197 Va. 821, 827, 91 S.E.2d 415, 420 (1956)).

461. *Paschall v. CBS Corp.*, No. 3:11CV431-HEH, 2011 U.S. Dist. LEXIS 104725, at \*1 (E.D. Va. Sept. 15, 2011) (citing *Culkin v. CNH America LLC*, 598 F. Supp. 2d 758, 760 (E.D. Va. 2009)).

462. *Price v. Food Lion, Inc.*, 768 F. Supp. 181, 182–83 (E.D. Va. 1991).

463. *Obrist v. Lantz*, 73 Va. Cir. 80, 83–84 (2007) (City of Roanoke).

464. *Lambert v. Javed*, 273 Va. 307, 310–11, 641 S.E.2d 109, 111 (2007); *Russell v. Hartsoe*, No. CL2006-8359, 2006 Va. Cir. LEXIS 219, at \*1, \*4–6 (Va. Cir. Ct. 2006) (Fairfax County).

- (8) A defendant is not limited in a refiled action after a nonsuit to raising only the defenses asserted in the nonsuited action.<sup>465</sup>
- (9) Knowledge acquired during full discovery in nonsuited action is chargeable to the defendants' attorney in a refiled action who signed grounds of defense which violated Virginia Code section 8.01-271.1.<sup>466</sup>
- (10) It is proper to reject a request to include language in a nonsuit order that nonsuit of one of four counts in the plaintiff's pleadings would not affect the admissibility or nonadmissibility of evidence on the three remaining counts.<sup>467</sup>
- (11) The doctrine of *autre* (other) action applies when two identical actions are pending, and provides that "two courts, at one and the same time, cannot entertain suits over the same subject matter and adjudicate the rights of the same persons there."<sup>468</sup> Nevertheless, plaintiffs are entitled to file one action, file a second identical action in another jurisdiction, then nonsuit the first action and proceed with the second action in the different jurisdiction.<sup>469</sup>
- (12) There is no equitable exception to the non-applicability of the Virginia nonsuit statute to foreign nonsuits because the plaintiff allegedly opportunistically exercised his right to nonsuit in a foreign jurisdiction in order to avoid an adverse outcome.<sup>470</sup>
- (13) *Comity* principles did not require a Virginia court to give recognition or preclusive effect to a nonsuit taken in a court in Switzerland where Swiss law considered the Swiss non-

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465. *Antisdel v. Ashby*, 279 Va. 42, 47, 688 S.E.2d 163, 166 (2010) (citing *Daniels v. Warden of the Red Onion State Prison*, 266 Va. 399, 402, 588 S.E.2d 382, 383 (2003)).

466. *Ford Motor Co. v. Benitez*, 273 Va. 242, 251, 639 S.E.2d 203, 207 (2007).

467. *Nat'l Trust for Historical Pres. v. Board of Supervisors*, 80 Va. Cir. 321, 331–32 (2010) (Orange County).

468. *Griffin v. Birkhead*, 84 Va. 612, 616, 5 S.E. 685, 687 (1888).

469. *Moore v. Gillis*, 239 Va. 239, 241–42, 389 S.E.2d 453, 454 (1990).

470. *Clark v. Clark*, 11 Va. App. 286, 294, 398 S.E.2d 82, 86–87 (1990) (citing *Berryman v. Moody*, 205 Va. 516, 519, 137 S.E.2d 900, 902 (1964)) (noting that the nonsuit privilege cannot be denied because a claimant has surmised the probable outcome of the litigation and has avoided an unfavorable judgment by taking a nonsuit).

suit to be equivalent of a procedural default by the plaintiff for purposes of further litigation upon the cause of action.<sup>471</sup>

- (14) Just as with failure of notice, untimely service of process will not defeat the right to a first nonsuit.<sup>472</sup>
- (15) Where a plaintiff submits a proposed nonsuit order to the trial court but does not schedule it for hearing, and the court, some eighteen months later, enters that proposed order nunc pro tunc to the date it was originally submitted, the court's nunc pro tunc entry of the nonsuit order created an impermissible fiction, and reversible error.<sup>473</sup>
- (16) The thirty-day limitation periods of Supreme Court of Virginia Rules 2A:2 and 2A:4, applying to appeals of final agency orders, do not apply to the refiling of an appeal which has been nonsuited in accordance with section 8.01-380. Instead, such refiling is governed by section 8.01-229(E)(3).<sup>474</sup>
- (17) Virginia Code section 8.01-229(B)(2)(a), pertaining to the death of a person against whom a personal action may be brought, permits the filing of a cause of action before the expiration of the applicable statute of limitations, or within one year of the qualification of a decedent's personal representative, whichever occurs later. Section 8.01-229(B)(2)(a) applies when a cause of action accrues but no action is commenced before the decedent's death, if the applicable statute of limitations has not expired before death. The statute's tolling provisions are limited to the pleading of a new substantive cause of action. Thus, when the plaintiff suffers a nonsuit, and has the six-month period provided by

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471. *Clark*, 11 Va. App. at 296, 299, 398 S.E.2d at 87, 89.

472. *Parsch v. Massey*, 71 Va. Cir. 209, 212 (2006) (City of Charlottesville) (holding that, despite plaintiff's failure to serve process within one year and lack of due diligence in effecting service, untimely service of process is not fatal to a request for nonsuit) (citing *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001); *Gilbreath v. Brewster*, 250 Va. 436, 440-41, 463 S.E.2d 836, 838 (1995)); see *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 761-62 (1995).

473. *Brake v. Payne*, 268 Va. 92, 100-01, 597 S.E.2d 59, 64 (2004).

474. *Joy House Senior Homes, L.C. v. Jones*, 75 Va. Cir. 140, 145 (2008) (Fairfax County).

section 8.01-229(E)(3) to refile the nonsuited action, section 8.01-229(B)(2)(a) does not apply to extend that six-month period.<sup>475</sup>

#### XI. VOLUNTARY DISMISSAL IN FEDERAL COURT AND VIRGINIA NONSUIT

There is no right to nonsuit per se in federal court. However, the Supreme Court of Virginia has recognized that voluntary dismissal in federal court practice, under Federal Rule of Civil Procedure 41(a)(1)(A)(i), is closely, albeit not identically, related to Virginia's nonsuit practice.<sup>476</sup> This relationship has been discussed previously in Part V.B of this article, in the context of Virginia Code section 8.01-299(E)(3), and additional nonsuits, for example, whether a motion for nonsuit in Virginia circuit court, following a voluntary dismissal in federal court is an additional nonsuit under Virginia Code section 8.01-300(B).

In *Welding, Inc. v. Bland County Service Authority*, the court stated that “[t]he term ‘nonsuit’ identifies a specific practice used in Virginia civil procedure.”<sup>477</sup> Federal court practice does not include a procedure labeled a ‘nonsuit’, but does recognize procedures which are substantially equivalent to Virginia’s nonsuit.<sup>478</sup> More recently, in *Inova Health Care Services v. Kebaish*, the court noted that

[a]lthough a voluntary dismissal and a nonsuit provide a plaintiff with a similar procedural right, the exercise of that right varies significantly. In federal procedure, a voluntary dismissal as a matter of right is available only if exercised at the outset of the proceeding; whereas, use of a nonsuit under Code section 8.01-380(A) may be exercised much later in the proceeding—even at trial. Accordingly, the right to take a nonsuit pursuant to Code [section] 8.01-380(B) in a Virginia state court is *much more expansive* than the right to a voluntary dismissal pursuant to Federal Rule 41(a)(1)(A)(i) in federal court.<sup>479</sup>

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475. *Scott v. Gardner*, 73 Va. Cir. 417, 418–19 (2007) (City of Danville).

476. *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 223–24, 541 S.E.2d 909, 912 (2001).

477. *Id.*

478. *See* FED. R. CIV. P. 41.

479. *Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 345, 732 S.E.2d 703, 707 (2012); *see also supra* Part V.B.1 (establishing the premise that a dismissal pursuant to Federal Rule of Civil Procedure 41(a) is not a nonsuit, so as to bar a subsequent first non-

Thus, “[a] nonsuit is only the functional equivalent to a voluntary dismissal to the extent that both a nonsuit and a voluntary dismissal provide a plaintiff with a method to voluntarily dismiss the suit up until a specified time in the proceeding.”<sup>480</sup> In other words, *Inova Health Care Services* rejects the holdings in a number of earlier federal decisions that essentially considered a voluntary dismissal in federal court under Federal Rule of Civil Procedure 41(a)(1)(A)(i) to effectively be a nonsuit under Virginia law.<sup>481</sup>

Even if Federal Rule of Civil Procedure 41(a)(1) is the functional equivalent of a Virginia nonsuit, per *Scoggins v. Douglas*, the voluntary dismissal of an appeal to a United States court of appeals pursuant to Federal Rule of Appellate Procedure 42 is not—even where the dismissal was without prejudice—and the tolling provisions of Virginia Code section 8.01-229(E)(3) are not applicable thereto.<sup>482</sup>

Just as Virginia courts have rejected Rule 41(a)(1)(A)(i) as the full functional equivalent of Virginia Code section 8.01-380, federal courts have similarly rejected any right of the federal plaintiff to rely upon Virginia Code section 8.01-380. Even in a diversi-

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suit of right under section 8.01-380(B)). Compare FED. R. CIV. P. 41(a)(1)(A)(i), with VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013). Federal Rule of Civil Procedure 41(a)(1)(A)(i) provides that, subject to Federal Rule of Civil Procedure 23(e), 23.1(c), 23.2 and 66, and any applicable federal statute, a plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. After that point, for a dismissal at the plaintiff's request, a court order is required, unless the dismissal is by stipulation signed by all the parties that have appeared. Such a dismissal by court order is on the terms that the court considers proper. FED. R. CIV. P. 41(a).

480. *Inova Health Care Servs.*, 284 Va. at 346, 732 S.E.2d at 708.

481. See, e.g., *Scoggins v. Douglas*, 760 F.2d 535, 538 (4th Cir. 1985) (stating that a nonsuit in Virginia practice is the functional equivalent of a voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1), and describing the difference between a nonsuit under Virginia law and a Rule 41 voluntary dismissal as more a matter of form than substance); *accord Shortt v. Richlands Mall Assocs., Inc.*, 130 F.R.D. 64, 67 n.6 (W.D. Va. 1990), *rev'd on other grounds* No. 90-2056, 1990 WL 207354 (4th Cir. Dec. 19, 1990); *Ambrose Branch Coal Co., Inc. v. Iankesly*, 106 B.R. 462, 467 (W.D. Va. 1989); *Yarber v. Allstate Ins. Co.*, 674 F.2d 232, 233 (4th Cir. 1982); see also *Sherman v. Hercules, Inc.*, 636 F. Supp. 305, 305–06 (W.D. Va. 1986) (characterizing a voluntary dismissal under Rule 41 as equivalent to a nonsuit in a personal injury case where Virginia state law provides the statute of limitations and permits the action to be refiled within six months regardless of the period expiring from the time the action accrued); cf. *In re Matthews*, 395 F.3d 477, 480 (4th Cir. 2005).

482. *Smith v. Sparshott*, No. CL2006-3261, 2006 Va. Cir. LEXIS 133, at \*10 (Va. Cir. Ct. Jan. 30, 2009) (Fairfax County).

ty case, a federal plaintiff may not rely upon Virginia's nonsuit statute in lieu of Rule 41.<sup>483</sup> The federal courts similarly reject the application of Virginia Code section 8.01-229 to the time limits set forth in federal statutes.<sup>484</sup>

Both a unilateral notice of dismissal under Rule 41(a)(1)(A)(i), and a stipulation of dismissal under Rule 41(a)(1)(A)(ii), are self-executing and effective immediately on filing with the clerk.<sup>485</sup> No judicial approval is required or of any consequence if entered. Even with stipulations of dismissal, the court is not empowered to attach conditions thereto. The filing immediately and automatically strips the district court of jurisdiction and dismisses the case. The court may, however, consider collateral questions even though the original suit is voluntarily dismissed; there may be instances where relief under Federal Rule of Civil Procedure 60(b) is appropriate, and a stipulation of dismissal may expressly provide for a contingency or extension of jurisdiction.<sup>486</sup> This contrasts with Virginia procedure, which requires the entry of a court order for a nonsuit to become effective.<sup>487</sup>

A voluntary dismissal under Rule 41(a)(1)(B) differs from a nonsuit under Virginia Code section 8.01-380 in another significant way. Section 8.01-380(B) permits an additional nonsuit of a cause of action previously nonsuited, either through the stipulation of counsel, or where allowed by the court upon reasonable notice to counsel of record for all defendants and a reasonable attempt to notify any party not represented by counsel.<sup>488</sup> However, under Rule 41(a)(1)(B), if the plaintiff has 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

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483. *Francis v. Ingles*, 1 F. App'x 152, 153–54 (4th Cir. 2001) (holding that Federal Rule of Civil Procedure 41 was sufficiently broad to cover the issue of a plaintiff's right to voluntarily dismiss his case).

484. *Pendleton v. Nat'l Wildlife Fed'n*, No. 5:10CV00009, 2010 U.S. Dist. LEXIS 29433, at \*9–10 (W.D. Va. March 26, 2010) (noting that where actions are governed by a federal statute of limitations, state tolling provisions are inapplicable).

485. See FED. R. CIV. P. 41(a)(1)(A).

486. See *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1277–78 (11th Cir. 2012); *De Leon v. Marcos*, 659 F.3d 1276, 1283 (10th Cir. 2011).

487. *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984). For a discussion of the Virginia procedure for the court's retention of jurisdiction after a nonsuit, see *supra* Part VI.

488. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013).

merits.<sup>489</sup> Accordingly, in federal courts, where a plaintiff has voluntarily dismissed his action via notice under Rule 41(a)(1)(A)(i), there is no prospect for an additional voluntary dismissal of the same cause of action; only “one bite of the apple” is permitted.<sup>490</sup> However, this so-called “two dismissal rule” is not “plaintiff unfriendly.” It is confined to a voluntary dismissal via *notice*.<sup>491</sup> A voluntary dismissal via the *stipulation* of the parties, under Rule 41(a)(1)(A)(ii), or pursuant to *court order*, under Rule 41(a)(2), is not subject to the “two dismissal rule.”<sup>492</sup> The latter provides no bar to subsequent voluntary dismissals under either Rule 41(a)(1)(A)(ii) or 41(a)(2).<sup>493</sup>

Court approval does come into play for a voluntary dismissal in federal courts under Rule 41(a)(2), as the only means of obtaining a first voluntary dismissal after the defendant has filed an answer or a motion for summary judgment. At this juncture, court approval is “on terms that the court considers proper.”<sup>494</sup> While that phrase is not defined in Rule 41, one court has held that “no ‘terms and conditions’ are conceivable except such as are calculated to compensate the defendant for the expense to which he has been put.”<sup>495</sup> In contrast, under the Virginia nonsuit statute, the court may place no restrictions on a plaintiff’s right to a first nonsuit. Even in approving an additional nonsuit, the Virginia court is permitted only to assess costs and reasonable attorney fees against the nonsuiting party.<sup>496</sup> As previously discussed in Part V.B. of this article, the doctrine of *expressio unius est exclusio alterius* limits the Virginia court’s authority to levy the stated costs and attorney’s fees to the plaintiff, giving the court no judicial discretion to broadly allow an additional nonsuit “on terms

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489. FED. R. CIV. P. 41(a)(1)(B).

490. “Because of the ease with which a voluntary dismissal may be secured, [federal] courts have held that the two-dismissal rule was ‘practically necessary to prevent an unreasonable use of dismissals.’” *Demsey v. Demsey*, 488 F. App’x 1, 3 (6th Cir. 2012) (internal quotations omitted); *see also ASX Inv. Corp. v. Newton*, 183 F.3d 1265, 1268 (11th Cir. 1999). Adoption of a similar restraint on additional nonsuits in Virginia civil practice would be both appropriate and desirable.

491. *See Cunningham v. Whitener*, 182 F. App’x 966, 969 (11th Cir. 2006).

492. *See id.*

493. *See id.*; *Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1076 (9th Cir. 1999).

494. FED. R. CIV. P. 41(a)(2).

495. *McCann v. Bentley Stores Corp.*, 34 F. Supp. 234, 235 (W.D. Mo. 1940) (citing *Paul E. Hawkinson Co. v. Goodman*, 32 F. Supp. 732, 734 (S.D. Cal. 1940)).

496. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013).

that the court considers proper.”<sup>497</sup> Thus, while Rule 41(a) advantageously provides an expansive and protective role for judicial discretion in the administration of voluntary dismissal, current Virginia nonsuit practice fails to do so—an area in need of change.

Consideration of prejudice to the defendant from a nonsuit plays a different role under Virginia nonsuit practice than such consideration under Rule 41(a) and (b). The federal rule gives greater consideration to prejudice to the defendant than does Virginia Code section 8.01-380. As previously discussed in Part IV of this article, the Supreme Court of Virginia has held that all of the common law considerations of prejudice to a defendant by a nonsuit have been codified in Code section 8.01-380(D) (former section 8.01-380(C)).<sup>498</sup> However, these considerations are limited to prohibiting a nonsuit without the consent of the adverse party who has filed certain dependent counterclaims, cross-claims, or third-party claims.<sup>499</sup>

On the other hand, Federal Rule of Civil Procedure 41(a)(1)(A) caps notices of voluntary dismissals at one event and relegates them to the initial stages of the trial in an effort to minimize the impact on the defendant.<sup>500</sup> When a plaintiff seeks a voluntary dismissal in federal court beyond the initial stages of trial, unlike the case in the Virginia courts, the factor of prejudice to the defendant is properly a matter of judicial concern and protection. Rule 41(a)(2) limits voluntary dismissals to those instances where minimal prejudice to the defendant will result.<sup>501</sup> Thus, voluntary dismissal under Rule 41(a)(2) may be denied where there is substantial or “plain legal prejudice” to the defendant.<sup>502</sup> This is a

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497. See *supra* Part V.B.

498. *Bremer v. Doctor's Bldg. P'ship*, 251 Va. 74, 81, 465 S.E.2d 787, 791 (1996).

499. *Bremer* did not include in its identification of codified common law considerations of prejudice the limitations on nonsuits set out in sections 8.01-380(A), (B), or (C). See *id.*

500. See *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 111 (2d Cir. 2012). By providing plaintiffs with a right to exercise their unfettered right to voluntarily and unilaterally dismiss their action before the opposing party has served an answer or motion for summary judgment, Federal Rule of Civil Procedure 41(a)(1)(A)(i) “confines this right to ‘an early stage of the proceedings’ and thus ensures against the sharp practice that could otherwise ensue.” *Id.* (quoting *Thorp v. Scame*, 599 F.2d 1169, 1175 (2d Cir. 1970)) (emphasis added).

501. See *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987).

502. See *Safeguard Bus. Sys., Inc. v. Hoeffel*, 907 F.2d 861, 863 (8th Cir. 1990) (quoting *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 220 (8th Cir. 1977)) (holding that “Rule 41 ‘fix[es] the point at which the resources of the court and the defendant

standard that would be appropriate to adoption as part of the Virginia nonsuit practice.

The consideration of “plain legal prejudice” to the defendant when the court considers whether to grant a voluntary dismissal under Rule 41(a)(2) does not disadvantage a plaintiff. Mere factual advantages accruing to a plaintiff obtaining a voluntary dismissal do not constitute sufficient legal prejudice to deny the dismissal. “Practical prejudice” is not enough; “legal prejudice” is required.<sup>503</sup>

The federal decisions requiring judicial approval for a voluntary dismissal under Rule 41(a)(2) have also looked to whether the plaintiff has provided an adequate or proper explanation for obtaining the desired dismissal.<sup>504</sup> This parallels the practice by a number of Virginia courts that consider whether a plaintiff seeking an additional nonsuit has shown good cause therefor.<sup>505</sup>

Voluntary dismissals under Rule 41(a)(1)(A)(i) provide greater balancing of both the plaintiff’s rights and the defendant’s rights, and better consider the interests of justice, than does the relatively unfettered first nonsuit of right under Virginia Code section 8.01-380(B):

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are so committed that voluntary dismissal without prejudice no longer is available as a matter of right”). *Compare* James v. UMG Recordings, No. C11-1613 SI, 2012 U.S. Dist. LEXIS 146759, at \*12–13 (N.D. Cal., Oct. 11, 2012) (finding defendant’s expenditure of considerable effort in producing discovery, reviewing documents, and deposing three defendants insufficient to bar voluntary dismissal), *with* Fuewell v. Cartledge, No. 4:11-cv-02757-RBH, 2012 U.S. Dist. LEXIS 111014, at \*8 (D.S.C., Aug. 8, 2012) (denying motion to dismiss without prejudice where case had advanced to the summary judgment stage, the parties had incurred substantial costs in discovery, and granting the motion would allow plaintiff to avoid summary judgment).

503. Barnes, *supra* note 7, at 940. There is no specific test for “plain legal prejudice,” either in the Federal Rules of Civil Procedure, or set out in the judicial decisions. Courts are utilizing a balancing test, applying a range of factors. Solimine & Lippert, *supra* note 7, at 391.

504. *See, e.g.*, Bridge Oil Ltd. v. Green Pacific A/S, 321 F. App’x 244, 245–46 (4th Cir. 2008); Seaver v. Klein-Swanson, No. 12-1001(DSD), 2012 U.S. Dist. LEXIS 115910, at \*3–4 (D. Minn., Aug. 17, 2012); Fuewell, 2012 U.S. Dist. LEXIS 111014, at \*7.

505. *Compare* Seaver, 2012 U.S. Dist. LEXIS 115910, at \*2 (finding that a desire to escape an adverse decision or to seek a more favorable forum is not an adequate explanation for a voluntary dismissal), *with* Clark v. Clark, 11 Va. App. 286, 294, 398 S.E.2d 82, 86 (1990) (citing Berryman v. Moody, 205 Va. 516, 519, 137 S.E.2d 900, 902 (1964)) (accepting as good cause for a nonsuit that the plaintiff surmised a probable adverse outcome of the litigation, and wished to avoid such an unfavorable result). *See generally supra* Part V.B of this article (discussing whether good cause is required for the grant of an additional nonsuit).

(1) Under Rule 41(a)(1)(B), “if 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.”<sup>506</sup> Under Virginia Code section 8.01-380, a subsequent nonsuit of the same action, while no longer of right, and requiring notice and either court approval or the stipulation of counsel, permits the action to be refiled and pursued anew.<sup>507</sup>

(2) Under Rule 41(a)(2), if the plaintiff seeks a voluntary dismissal after the opposing party serves either an answer, or a motion for summary judgment, or there is no stipulation of dismissal signed by all parties who have appeared, not only is a court order required, but the court may impose such terms therefor as it considers proper.<sup>508</sup> Under Virginia Code section 8.01-380, a court is prohibited from imposing terms or restrictions on a first nonsuit of right, and when an additional nonsuit is involved, the court is limited to potentially assessing only costs and attorney’s fees.<sup>509</sup>

(3) A first nonsuit of right under Virginia Code section 8.01-380(B) is always without prejudice.<sup>510</sup> While a voluntary dismissal under Rule 41(a)(1)(A)(i) is also normally without prejudice, Rule 41(a)(1)(B) permits the notice or stipulation to state otherwise.<sup>511</sup>

(4) The federal judicial system recognizes that a voluntary dismissal may prejudicially impact the defendant and the judicial system.<sup>512</sup> Accordingly, dismissal under Rule 41(a) is limited to

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506. FED. R. CIV. P. 41(a)(1)(B).

507. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013).

508. FED. R. CIV. P. 41(a)(2); *Fitzgerald v. Alleghany Corp.*, 882 F. Supp. 1433, 1437 (S.D.N.Y. 1995).

509. VA. CODE ANN. § 8.01-380 (Cum. Supp. 2013); *see also* *Janvier v. Arminio*, 272 Va. 353, 365, 634 S.E.2d 754, 760 (2006) (“[W]ith respect to a first nonsuit a trial court may not place limitations on the absolute right of the plaintiff to seek the nonsuit beyond those found in the statute.”).

510. VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013); *see also* *Montgomery v. McDaniel*, 271 Va. 465, 470, 628 S.E.2d 529, 532 (2006) (“The ability to refile the action at some future time is a right afforded a plaintiff by the General Assembly, regardless of any inconvenience or discomfort it might place on unsuited defendant.”).

511. FED. R. CIV. P. 41(a)(1)(A)–(B).

512. *See supra* notes 500–03 and accompanying text.

those instances where minimal prejudice will result to the defendant. That is not a consideration under Virginia Code section 8.01-380.<sup>513</sup>

Rule 41(a) does what Virginia Code section 8.01-380 does not do. It equitably balances the interest of both the plaintiff and the defendant, and is fair to each when a voluntary dismissal is taken. It equally protects the interests of both the trial court and the judicial system. The federal rule preserves for the plaintiff an unfettered right to voluntarily dismiss the case, while judiciously limiting that right—either to the preliminary stages of the trial or by the “two dismissal rule.” At the same time, it gives some protection to the defendant from the inequity, prejudice, and loss which often results from the abrupt termination of litigation, especially in its later stages, after the defendant’s unreimbursed expenditure of considerable time, effort and funds in trial preparation. Finally, the federal rule guards the interests of the trial court and the judicial system in permitting the trial court to control its docket and diminish the dissipation of judicial resources and potential inconvenience to jurors which result from inadequately controlled voluntary dismissals.

## XII. NONSUIT IS BROKEN, AND IT NEEDS FIXING

The old adage “if it ain’t broke . . . don’t fix it” is particularly applicable to a judicial system, which relies upon precedent to ensure stability and predictability. Nevertheless, when logic, reason, and fairness compel change, a functional legal system must respond. That is the case with nonsuit in Virginia: It is broken, and it needs fixing.

Given the ancient roots and longevity of nonsuit, it is not surprising that it continues to cling to life in Virginia, and to have burrowed itself into the Code of Civil Remedies and Procedure in a form that, in many ways, gives a nearly unfettered right to its exercise by the plaintiff. Whether this is a result of historical nostalgia, legislative ennui, or the power of the plaintiff’s bar, by any objective evaluation there is no longer any legitimate rationale supporting the continuation of nonsuit in the form in which it currently exists in Virginia. Nonsuit, in its present form, despite

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513. See *supra* Part IV.

prior statutory amendments, has become an insupportable anachronism, unduly burdensome to both defendants and the judicial system.

Nonsuits are unduly burdensome to defendants for a variety of reasons, including: The loss of all prior favorable rulings and orders of the court not constituting dismissals with prejudice or otherwise eliminating claims and parties from the case; the loss of all defense costs and expenses incurred in preparing the defense case, including attorney's and expert witness' fees incurred to that point in the trial; the expectancy of additional costs and expenses when the plaintiff refiles his action, including new discovery costs and expenses and, potentially, the costs and expenses of new or additional expert witnesses; and the potential that defense witnesses and some of the defense evidence available for the nonsuited trial may not be again available when the plaintiff refiles the action.<sup>514</sup> Further, nonsuit permits the plaintiff to get a preview of the defendant's case including possible defenses, during the discovery phase of the case, and allows the plaintiff an opportunity to better prepare to meet those defenses and the defendant's evidence in a refiled action.<sup>515</sup> Nonsuits are also unduly burdensome to the judicial system for a variety of reasons, including: A disruption of the trial court's scheduled docket; the wasted utilization of judicial resources, including the time and effort of the trial judge, which could have been devoted to other pending cases; and the unnecessary and unrecompensed imposition on the time and normal routines of any jurors impaneled.<sup>516</sup>

There is renewed interest in revising the current nonsuit practice in Virginia. The Virginia Chamber of Commerce, in its *2013 Legislative Priorities*, supports nonsuit reform, taking the position that "Virginia's nonsuit rules create unfair advantages between litigants, increase litigation costs and result in a drain on court and jury time."<sup>517</sup> Further, as discussed in Parts II and V.C.

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514. See *supra* notes 2, 70–81 and accompanying text.

515. Barnes, *supra* note 7, at 936.

516. See *Trout v. Commonwealth Transp. Comm'n*, 241 Va. 69, 73, 400 S.E.2d 172, 174 (1991) (noting not only the defendant's loss of time and expense incurred in preparation when a nonsuit is taken on the eve of trial, but the "disruption which may result to the court's docket").

517. THE VA. CHAMBER OF COMMERCE, *WHERE WE STAND 3* (2013 ed., 2012), available at <http://www.vachamber.com/wp-content/uploads/2012/05/Va-Chamber-Legislative-Priorities-Book-2013-LowRez.pdf>.

of this article, four bills to amend Virginia Code section 8.01-380 were introduced in the 2013 Virginia General Assembly, and three others, while not proposing amendments to the nonsuit statute, would, had they been enacted, have affected nonsuit practice in Virginia.

Numerous commentators have taken a critical view of an unfettered right to nonsuit, and their criticism is compelling.<sup>518</sup> In particular, Tucker tellingly observes that “[t]he retention of a basically ancient system, whose only real result today is to prolong litigation, necessarily lends to needless decisions based upon mere technicalities of procedure.”<sup>519</sup> While other commentators have not specifically identified the Virginia nonsuit practice in their comments, their observations are directly applicable to it.<sup>520</sup> Lipkin argues for the adoption by the states of Rule 41(a), or its equivalent, on the ground that both defendants and the state have an interest in avoiding needless litigation and putting an end to legal controversies, and that under many nonsuit statutes, “the ends of justice are defeated when the plaintiff is permitted to harass the defendant and to waste the time of the court and the money of the public.”<sup>521</sup> One state supreme court has recognized the unfairness to defendants and the courts of nonsuits or voluntary dismissals.<sup>522</sup> In commenting upon the benefits of Rule 41, some federal courts have emphasized the patent unfairness of allowing a plaintiff to voluntarily dismiss after the defendant had expended a considerable sum of money and devoted a great deal of time in preparing for trial.<sup>523</sup>

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518. See, e.g., Tucker, *supra* note 1, at 366–67 (noting Virginia’s nonsuit practice “frequently results in loss of time and money to the defendant, plus the vexing imposition of prolonged litigation”).

519. *Id.* at 367.

520. See, e.g., Lipkin *supra* note 7, at 987.

521. *Id.*; accord Head, *supra* note 7, at 27 (noting that “[w]hen the plaintiff has once fairly launched his cause of action the discontinuance of it should be within the control of the judge”); Walker, *supra* note 7, at 191 (favoring adoption of a state analogue to Federal Rule of Civil Procedure 41(a), because “it would rid the present law of discontinuance and nonsuit of its inherent susceptibility to abuse”).

522. See *Gibellina v. Handley*, 535 N.E.2d 858, 864–66 (Ill. 1989) (commenting on the Illinois voluntary dismissal statute, which limits the plaintiff’s right as it existed at common law, and noting the statute’s increasing burden on already crowded dockets and on the authority of the judiciary to discharge its duties fairly and expeditiously).

523. See *Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 107–08 (2d Cir. 1953) (noting that the essential purpose of Federal Rule of Civil Procedure 41(a)(1) is “preventing arbitrary dismissals after an advanced stage of a suit has been reached”);

All of the foregoing provides compelling reasons for abolishing any unilateral right to nonsuit, whatever the stage of trial, and placing nonsuit solely within the discretion of the trial judge. Indeed, some of the commentators have urged just that.<sup>524</sup> However, such a drastic step is neither appropriate, nor politically feasible. There are times when, through no fault of the plaintiff, a fair trial of the action is jeopardized by temporary circumstances. It is appropriate for a controlled nonsuit or voluntary dismissal to be available in these cases, to permit their subsequent trial and disposition, after the presentation of all available evidence.<sup>525</sup> Moreover, the Virginia General Assembly is not likely to completely abolish voluntary nonsuit, nor should it.

Legal academics are not alone in their frustration with and criticism of an “absolute” right to nonsuit. A 1994 petition for appeal to the Supreme Court of Virginia, while not granted, raised serious questions as to the constitutionality of Virginia’s nonsuit statute under the “Special Laws” provisions of Article IV, sections 14 and 15 of the Virginia Constitution and under the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 11 of the Virginia Constitution.<sup>526</sup>

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McCann v. Bentley Stores Corp., 34 F. Supp. 234, 234 (W.D. Mo. 1940) (referring to the taking of a voluntary dismissal in the latter stages of the trial as “an outrageous imposition not only on the defendant but also on the court”).

524. See Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Nonsuit*, 63 YALE L.J. 738, 743 (1954); Note, *Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, 1962 DUKE L.J. 285, 289–90.

525. As previously discussed, a variety of reasons have been asserted in support of a plaintiff’s right to nonsuit, including but not limited to: (1) plaintiff’s key witnesses (including experts) or evidence were ultimately unable to be timely obtained or became suddenly unavailable; (2) plaintiff was surprised by the turn of events at trial and found his case going badly; (3) plaintiff found himself insufficiently prepared to go to trial on a certain date; (4) the original allegations of the complaint could no longer be successfully pursued; (5) the plaintiff perceived that he was at a disadvantage because of the trial court’s prior or anticipated rulings; (6) the plaintiff wanted to refile in federal court or in another jurisdiction with a longer statute of limitations or other more favorable substantive laws; (7) the plaintiff suddenly discovered new evidence; (8) the plaintiff changed his mind about a bench trial, or decided to nonsuit his equitable claims and refile upon issues with a right to be tried by jury; (9) discovery revealed the likelihood the case would be unsuccessful; (10) mounting expenses of discovery and other trial preparation exceeded the plaintiff’s available finances; (11) or the plaintiff’s attorney becomes conflicted or unavailable. These reasons, however, are not unique to Virginia litigants and exist equally for litigants in federal court and in each of the states which have adopted an analog to Federal Rule of Civil Procedure 41.

526. Petition For Appeal in *Berry Homes of Va., Inc. v. Bd. of Dir. Hampton Pointe*

Whether or not nonsuit in Virginia passes constitutional muster, the conditions that gave it life have long since disappeared. Even though the right was absolutely unrestricted at early common law, Virginia's continued perpetuation of a minimally limited right to nonsuit ignores why such an unrestricted right was originally appropriate.<sup>527</sup> Those plaintiffs carried a heavier burden than today's plaintiffs. Liberal pleading rules did not exist, and causes of action in those days had to be brought under ancient writs and hypertechnical rules of procedure. If the plaintiff brought his case under an incorrect writ he was unable to remedy the mistake.<sup>528</sup> Those are not the conditions in which today's Virginia attorneys practice, and they provide no basis for contemporary adherence to historical precedent that is no longer sustainable. Moreover, modern English civil practice prohibits the plaintiff from discontinuing his case, except with the permission of the court, after the defendant's pleading and the taking of any other proceeding in the action.<sup>529</sup> It appears that the English are less wedded to early English nonsuit practice than Virginia.

Thus, the historical reason that originally supported the development and continuation of nonsuit no longer exists in the context of modern pleading and practice.<sup>530</sup> As pointedly observed by Conklin & Nachman:

The history of the voluntary dismissal demonstrates that courts and legislatures have been slow to reconcile the original purpose for this procedure with modern day conditions. Common-law code pleading

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*Condo. Unit Owners Assoc.*, No. 941484, Aug. 26, 1994. This constitutional argument differs from those rejected in *McManama v. Plunk*, 250 Va. 27, 32–33, 458 S.E.2d 759, 761–62 (1995), *Clark v. Butler Aviation-Washington Nat'l, Inc.*, 238 Va. 506, 512 n.5, 385 S.E.2d 847, 850 n.5 (1989), and *Plinkinton v. NVC of Vienna, Inc.*, 51 Va. Cir. 147, 149–50 (1999) (Fairfax County).

527. Head, *supra* note 7, at 22.

528. Barnes, *supra* note 7, at 923–24.

529. Lipkin, *supra* note 7, at 970 (noting that a British plaintiff was denied a voluntary dismissal he requested immediately after his opening statement and prior to the introduction of any evidence).

530. As discussed previously in Part V of this article, nonsuit initially developed from the common law practice of requiring the plaintiff's presence, or that of his counsel, in court to receive the verdict. If he was not in court, and he could not be compelled to be, no verdict could be given, nor could an amercement (a money penalty) be levied against him for the failure of his suit, which would occur if the verdict were to be actually given against him. Accordingly, when a plaintiff perceived that he would likely not obtain a favorable jury verdict, he would deliberately absent himself from court. The plaintiff would then be nonsuited, and thus be free to bring another suit at a more convenient time. Tucker, *supra* note 1, at 359; Head, *supra* note 7, at 21–22.

has been abolished in favor of more liberal notice pleading. Parties are afforded great leeway in amending their pleadings, including the right to amend pleadings to conform to proof after trial. The possibility of a case being dismissed on purely technical grounds is virtually nonexistent. Therefore, the primary reasons for permitting voluntary dismissals without leave of court are obsolete and illusory.<sup>531</sup>

Plaintiffs today have remedies other than nonsuit available to them if they are surprised by new evidence or if they subsequently discover inadequacies in their original pleadings.

The same is true with respect to other former “pleading traps” which once could have ensnared the unwary plaintiff and provided justification for according him or her an absolute right to nonsuit. For example, misjoinder or nonjoinder of parties or causes of action no longer provide an automatic basis for dismissal of a plaintiff’s cause of action.<sup>532</sup> Moreover, Virginia Code section 8.01-5 forbids the abatement or defeat of an action or suit by the nonjoinder or misjoinder of parties,<sup>533</sup> Virginia Code section 8.01-272 permits the joining of tort and contract claims arising out of the same transaction or occurrence,<sup>534</sup> Virginia Code section 8.01-275 forbids the abatement of an action for want of form;<sup>535</sup> and Virginia Code section 8.01-281 permits pleading in the alternative where such claims, defenses or demands arise out of the same transaction or occurrence.<sup>536</sup>

Another scholar rejects the common law concept that since a defendant has no control over the plaintiff’s right to sue, he has no standing to object to the plaintiff’s dismissal of the action.<sup>537</sup>

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531. Conklin & Nachmin, *supra* note 7, at 251. “Virginia is a notice pleading jurisdiction.” Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 407, 732 S.E.2d 676, 689 (2012). Prior to *GP Consulting*, there were conflicting views as to whether Virginia was a notice pleading state. Compare Landis v. O’Connor, 33 Va. Cir. 256, 260 (1994) (Loudoun County) (“There is a common misconception that Virginia is a ‘notice’ pleading state. It is not.”), and Ian Wilson & William Payne, Note, *The Specificity of Pleading In Modern Civil Practice: Addressing Common Misconceptions*, 25 U. RICH. L. REV. 135, 135 (1990) (“A common misconception in modern Virginia practice is that Virginia is a ‘notice’ pleading state.”), with *In re Vick*, 36 Va. Cir. 75, 76–77 (1995) (City of Richmond) (“This is a notice pleading state.”), and Thomas Keister Greer, *Virginia and the Federal Rules*, 47 VA. L. REV. 906, 909 (1961) (stating that “notice pleading is part and parcel of the Virginia rules”).

532. Fox v. Deese, 234 Va. 412, 423, 362 S.E.2d 699, 704–05 (1987).

533. VA. CODE ANN. § 8.01-5 (Repl. Vol. 2007 & Cum. Supp. 2013).

534. *Id.* § 8.01-272 (Repl. Vol. 2007 & Cum. Supp. 2013).

535. *Id.* § 8.01-275 (Repl. Vol. 2007).

536. *Id.* § 8.01-281 (Repl. Vol. 2007 & Cum. Supp. 2013).

537. Carroll, *supra* note 7, at 522–23.

Carroll instructively notes that:

Under the modern rules of procedure, substantial rights accrue to the defendant once he has been forced to come in and defend the suit. Thus, after the filing of an answer or a motion for summary judgment (federal system) or the commencement of the trial (Ohio system), the defendant has acquired rights in the litigation sufficient to cut off the plaintiff's ability to dismiss the action as of right.<sup>538</sup>

Carroll also points out that another original reason for an absolute right to nonsuit—that the actual conduct of the law suit was the only available means of discovery—has long since ceased to exist.<sup>539</sup> That is certainly the case in Virginia today, where pretrial discovery is extensive.<sup>540</sup> Moreover, our current judicial system demands that, even before the plaintiff files an action, the plaintiff and the attorney must conduct a “reasonable inquiry” to objectively determine that the pleading is “well grounded in fact,” and meets the other requirements of Virginia’s analogue of Federal Rule of Civil Procedure 11.<sup>541</sup> Nevertheless, the mere fact that a plaintiff has taken a nonsuit as a matter of right is not a concession that the suit was filed without reasonably determining that it was well-grounded in fact, nor is it alone, a basis for sanctions.<sup>542</sup> As previously discussed in Part VII of this article, sanctions may be imposed after nonsuit, but only for prior conduct, unrelated to the nonsuit,<sup>543</sup> and the court is currently powerless to deny the plaintiff his first nonsuit even if it imposes sanctions. That lack of judicial power should be modified.

Where a plaintiff seeks nonsuit because of unexpected events, such as the sudden unavailability or change in expected testimony of a key witness, a continuance may be available, and no sanctions are appropriate. However, to permit nonsuit where a plaintiff learns that the case is not supportable only after the actual

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538. *Id.* at 523 n.39.

539. *Id.* at 523 (“The inadequacy of discovery, therefore, is no longer a valid reason for the largely unrestricted right of the plaintiff to voluntarily dismiss.”).

540. See VA. SUP. CT. R. pt. 4 (Repl. Vol. 2013); W.H. BRYSON, DISCOVERY IN VIRGINIA 1–2 (1978).

541. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2013).

542. See *Breckner v. Hallen*, 36 Va. Cir. 79, 81 (1995) (Spotsylvania County); *Warf v. Fields*, 33 Va. Cir. 1, 4 (1993) (Loudoun County); *Becon Servs. Corp. v. Hazel Indus., Inc.*, 33 Va. Cir. 554, 558 (1992) (Loudoun County); *Lankford v. Moore Marine, Inc.*, 22 Va. Cir. 295, 297 (1990) (City of Richmond).

543. *Sawyer v. Jarrett*, 36 Va. Cir. 436, 437 (1995) (City of Fredericksburg). See *supra* Part VII.

commencement of trial proceedings is patently contrary to the basic purpose of Virginia Code section 8.01-271.1.<sup>544</sup> Anachronistic adherence to the historical prerogative of nonsuit should not continue to shield litigants from the obligations and penalties for violation of section 8.01-271.1. If the totality of circumstances surrounding a motion for nonsuit establish that a violation of section 8.01-271.1 has occurred, the appropriate sanction should be clearly authorized to include denial of nonsuit.

Additionally, the deleterious impact of a late-stage nonsuit upon the defendant can no longer be tolerated on the historical ground that it is assuaged by the imposition of costs upon the nonsuiting plaintiff. Since 1954, Virginia Code section 8.01-380(B), has precluded the assessment of costs for an initial nonsuit of right<sup>545</sup> and section 8.01-380(C), applicable in only limited circumstances, does not effectively change that preclusion.<sup>546</sup> So too, even if future sessions of the General Assembly should enact legislation similar to the 2002 session's S.B. 558,<sup>547</sup> the discretionary authority to assess against a late nonsuiting party the costs actually incurred by the court in summoning or impaneling jurors for the trial, not applicable in bench trials, would do nothing to ameliorate the deleterious impact of a late-stage nonsuit upon the defendant.

From 1819 to 1954,<sup>548</sup> the Code of Virginia required the nonsuiting plaintiff to pay the defendant, "besides his costs, five dollars."<sup>549</sup> Earlier, the 1753 statute required the nonsuiting plaintiff

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544. While Virginia Code section 8.01-271.1 imposes no continuing duty upon a lawyer to update his pleadings in light of any new findings, "the duty of 'reasonable inquiry' arises *each time* a lawyer files a 'pleading, motion, or other paper' or makes 'an oral motion.'" Oxenham v. Johnson, 241 Va. 281, 288, 402 S.E.2d 1, 4 (1991). Permitting a plaintiff to nonsuit upon first learning that his case is not supportable after the commencement of trial proceedings is consistent with Virginia Code section 8.01-271.1 only in the event that the plaintiff has previously met his duty of objective reasonable inquiry both at the pre-filing state and throughout the pretrial discovery state of the case. This is an unlikely circumstance.

545. Compare VA. CODE ANN. § 8.01-380(B) (Cum. Supp. 2013), with MD. RULE 2-506(d) (Repl. Vol. 2009) (placing upon the dismissing party the responsibility for all costs of the action, or of the part dismissed, in any case which a party obtains a voluntary dismissal).

546. See VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

547. See S.B. 558, Va. Gen. Assembly (Reg. Sess. 2002).

548. See Act of Apr. 1, 1954, ch. 333, 1954 Va. Acts 411, 417 (codified as amended at VA. CODE ANN. § 8-220 (Repl. Vol. 1954)).

549. VA. CODE ANN. § 6078 (1942); VA. CODE ANN. § 6078 (1918); VA. CODE ANN. § 3240 (1887); VA. CODE ANN. ch. 171 § 5 (1849); VA. REV. LAWS ch. 128 § 72 (1819).

to pay “one hundred and fifty pounds of tobacco, and costs.”<sup>550</sup> These code provisions had deep historical roots. As noted by Blackstone in his *Commentaries*, the nonsuitor plaintiff was not only required to “pay costs to the defendant, but (was) liable to be amerced to the king.”<sup>551</sup>

The basis for the statutory imposition of both costs and a penalty upon the nonsuitor plaintiff was explained in *Pinner v. Edwards*:

This provision, justly imposing a penalty on the Plaintiff for vexing his adversary with a suit, which is afterwards abandoned, and giving some remuneration to the Defendant, for the expense and trouble to which he has been exposed, extends . . . to all cases of a voluntary desertion of the cause by the Plaintiff after the appearance of the Defendant.<sup>552</sup>

The United States Supreme Court also stressed the compelling logic for the historical assessment of costs against a nonsuitor plaintiff in *Chicago & Alton R.R. Co. v. Union Rolling Mill Co.*: “The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted.”<sup>553</sup> That assumption can no longer be made. When, as in Virginia today, nonsuit is permitted beyond the early stage of a trial, a defendant, uncompensated for costs and expenses, is most assuredly not “in the same position as he would have stood if the suit had not been instituted.”<sup>554</sup> Except under the limited circumstances set out in Virginia Code section 8.01-380(C), current section 8.01-380 imposes no costs or penalties upon the first nonsuit, and gives no relief to the defendant “for the expense and trouble to which he has been exposed.”<sup>555</sup> Indeed, as previously discussed, even for subsequent nonsuits, the authorization of section 8.01-380(B), permitting the court to

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550. Acts of Assembly, Nov. 1, 1753, ch. 1 § 24; *McManama v. Plunk*, 250 Va. 27, 37–38, 458 S.E.2d 759, 764–65 (1995) (Whiting, J., dissenting) (tracing these statutory provisions).

551. 3 WILLIAM BLACKSTONE, COMMENTARIES \*771. An “amercement” is a money penalty, in the nature of a fine. BLACK’S LAW DICTIONARY 81 (6th ed. 1990).

552. *Pinner v. Edwards*, 27 Va. (6 Rand.) 675, 677 (1828).

553. *Chicago & Alton R.R. Co. v. Union Rolling Mill Co.*, 109 U.S. 702, 714 (1884). While *Union Rolling Mill* was an equity case, nonsuit principles in Virginia today are applicable to both law and chancery cases. See *Moore v. Moore*, 218 Va. 790, 795, 240 S.E.2d 535, 538 (1978).

554. *Chicago & Alton R.R. Co.*, 109 U.S. at 714.

555. See VA. CODE ANN. § 8.01-380(C) (Cum. Supp. 2013).

assess costs and reasonable attorney's fees, is limited to the action being nonsuited.<sup>556</sup> Moreover, section 8.01-380(B) does not allow the court to condition the filing of an amended motion for judgment upon the payment of the opposing party's attorney's fees incurred in the defense of the plaintiff's similar action which was nonsuited in an earlier proceeding.<sup>557</sup>

The Supreme Court of South Carolina expressed understandable dissatisfaction with nonsuit in such circumstances thusly:

The reason for dissatisfaction with a rule that one man should be allowed to draw another into litigation and drop him out at pleasure, without a decision of the issue tendered, is much stronger now since costs have been practically abolished, and the penalty of having to pay them no longer deters plaintiffs from seeking unfair discontinuances.<sup>558</sup>

Long overdue corrective measures for this problem were the subject of two bills introduced by delegates to the 1996 session of the Virginia General Assembly. As previously discussed, H.B. 876, introduced by Delegate V. Earl Dickinson (D-Mineral), would have permitted the trial court to assess costs and attorney's fees against a party nonsuiting for the first time, and would have required such assessment if a second nonsuit were permitted and the nonsuiting party did not prevail.<sup>559</sup> H.B. 1323, introduced in the 1996 session of the General Assembly by then Delegate Eric I. Canter (R-Richmond), would have required the trial court to assess costs and attorney's fees if a nonsuit were taken at any time after the plaintiff rested its case in chief, or if a second or other additional nonsuit were allowed.<sup>560</sup> Both H.B. 876 and H.B. 1323 were carried over to 1997 in the House Committee on Courts of Justice, where both died.<sup>561</sup>

In addition to its skewed impact upon the defendant, an "absolute" right to nonsuit, even as minimally modified by statute, is an unacceptable affront to the ability of Virginia trial courts to exercise control over their crowded dockets, to prevent repetitive

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556. See *supra* Part V.B.

557. *Albright v. Burke & Herbert Bank & Trust Co.*, 249 Va. 463, 468, 457 S.E.2d 776, 778-79 (1995).

558. *Romanus v. Biggs*, 59 S.E.2d 645, 649 (S.C. 1950) (quoting *State v. S. Ry. Co.*, 62 S.E. 1116, 1117 (1908)).

559. See *supra* note 26.

560. See *supra* note 26.

561. See *supra* note 26.

litigation, and to accord all litigants timely access to the judicial system. Moreover, the current Virginia nonsuit practice imposes significant uncompensated burdens upon the court's personnel and resources.

Virginia circuit court judges have added their voices to the concerns regarding the continued existence of a virtually unfettered nonsuit practice. In the previously discussed Spotsylvania Circuit Court decision of *Breckner v. Hallen*, Judge William H. Ledbetter, Jr. expressed his obvious frustration with his inability to deny nonsuit under the circumstances:

This case typifies the hardships that Virginia's nonsuit statute can cause defendants under certain circumstances. Here, the [defendants], out-of-state residents, have retained counsel and contested [plaintiff's] claim in litigation for almost three years. They have attended an evidentiary hearing and have taken other actions with a reasonable expectation that the controversy would be resolved, for or against them, in this suit. Now their expectations are thwarted because the plaintiffs, after considerable delay, have decided to cease prosecution of their claim. Using the nonsuit statute, they are entitled to do so with the possibility that they might rekindle the controversy by new litigation another day. Nevertheless, the General Assembly has decided that the nonsuit statute fairly balances the litigants' interests in the greater number of cases, and this court is without authority to make equitable exceptions or adjustments.<sup>562</sup>

Another significant step on the road to reform would be for Virginia to follow the path of the significant number of states that have, to date, adopted Federal Rule of Civil Procedure 41 (a), or a comparable version thereof, as their voluntary nonsuit statutes.<sup>563</sup>

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562. *Breckner v. Hallen*, 36 Va. Cir. 79, 81–82 (1995) (Spotsylvania County).

563. In 1951, only five states had adopted Federal Rule 41, *see* Lipkin, *supra* note 7, at 985, but today some twenty-eight states and the District of Columbia have essentially adopted the language of Federal Rule of Civil Procedure 41(a). *See* ALA. R. CIV. P. 41(a)(1); ALASKA R. CIV. P. 41(a)(1); ARIZ. R. CIV. P. 41(a)(1); COLO. R. CIV. P. 41(a)(1); DEL. SUPER. CT. R. CIV. P. 41(a)(1); D.C. SUPER. CT. R. CIV. P. 41(a)(1); HAW. R. CIV. P. 41(a)(1); IDAHO R. CIV. P. 41(a); IND. R. TRIAL P. 41(A)(1); KAN. STAT. ANN. § 60-241(a)(1)(A) (2009); KY. R. CIV. P. 41.01(1); ME. R. CIV. P. 41(a)(1); MASS. R. CIV. P. 41(a)(1); MICH. CT. R. 2.504(A)(1); MINN. R. CIV. P. 41.01(a); MISS. R. CIV. P. 41(a)(1); MONT. R. CIV. P. 41(a)(1); NEV. R. CIV. P. 41(a)(1); N.J. R. CIV. PRAC. 4:37-1(a); N.M. R. CIV. P. 1-041(A)(1); N.D. R. CIV. P. 41(a)(1); R.I. R. CIV. P. 41(a)(1); S.C. R. CIV. P. 41(a)(1); S.D. CODIFIED LAWS § 15-6-41(a)(1) (2004); UTAH R. CIV. P. 41(a)(1); VT. R. CIV. P. 41(a)(1); W. VA. R. CIV. P. 41(a)(1); WIS. STAT. ANN. § 805.04(1) (2012); WYO. R. CIV. P. 41(a)(1).

An excellent discussion of the practice of voluntary dismissal or nonsuit in the various states and the District of Columbia is found in Solimine & Lippert, *supra* note 7, at 376–78. They calculated that at that time, 2002–2003, twenty-two states and the District of Columbia essentially replicated Rule 41, while another ten states, by rule or statute, substantially followed the federal model. *Id.* at 376. They identified Virginia as one of only

Indeed, and compellingly, Rule 41(a)(1) “was designed to curb abuses of . . . nonsuit rules.”<sup>564</sup> These states have embraced the purpose of Rule 41(a), which permits the plaintiff to voluntarily dismiss the action, “without prejudice” and without judicial approval, only before service of the answer or a motion for summary judgment, whichever first occurs, or by the stipulation of all parties who have appeared in the action.<sup>565</sup> Further, Virginia should adopt the fairly consistent federal rule that a plaintiff will not be permitted to voluntarily dismiss, after the defendant has been put to expense in preparing for trial, except on the condition that the plaintiff reimburse the defendant for his costs and reasonable expenses, including attorney’s fees, or upon a condition other than the payment of money designed to reduce inconvenience to the defendant.<sup>566</sup> If the plaintiff finds the court-imposed terms and conditions too onerous, then the plaintiff need not accept the dismissal.<sup>567</sup>

States that have adopted their analogue of Rule 41(a)(2) follow the lead of the federal courts in imposing “terms and conditions” for delayed voluntary dismissal.<sup>568</sup> The courts of those states, like the federal courts, often limit any fee award to exclude expenses incurred by the defendant in preparing work product which will be useful in subsequent litigation of the same claim or incurred by a defendant unable to demonstrate legal prejudice from the dismissal.<sup>569</sup>

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thirteen states not following Rule 41(a)(1)(i). *Id.* at 377. Solimine and Lippert set forth the relevant portions of the statutes of each state and the District of Columbia addressing voluntary dismissal or nonsuit. *Id.* at 406–18; *see also* Barnes, *supra* note 7, at 941–44 (identifying and analyzing voluntary dismissal in states that modify the federal rule and states that retain limited variations of the common law rule of voluntary dismissal).

564. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990); *see also* *Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 344–45, 732 S.E.2d 703, 707 (2012) (quoting *Ockert v. Union Barge Line Corp.*, 190 F.2d 303, 304 (3d Cir. 1951)).

565. *See* Part XI *supra*.

566. *Belle-Midwest, Inc. v. Missouri Prop. & Cas., Ins.*, 56 F.3d 977, 978–79 (8th Cir. 1995). *But see* *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987) (finding that the district court abused its discretion when it denied the plaintiff’s motion for voluntary dismissal because the plaintiff refused to pay the defendant’s attorneys’ fees).

567. 9 WRIGHT & MILLER, *supra* note 83, at § 2366.

568. *See, e.g.*, *Mack Auto Imports v. Jaguar Cars, Inc.*, 581 A.2d 1372, 1375 (N.J. Super Ct. App. Div. 1990).

569. *See, e.g.*, *Carter v. Clegg*, 557 So. 2d 1187, 1193 (Miss. 1990). For the similar federal approach, *see, e.g.*, *Davis*, 819 F. 2d at 1276.

Several states have extended the protection of a defendant against prejudice or inconvenience resulting from a plaintiff's voluntary dismissal by mandating the latter's payment of all costs, or the defendant's filing fees, even where voluntary dismissal is effected prior to the time court approval is required, and apparently without regard to the usefulness of the defendant's work product in any subsequent litigation.<sup>570</sup>

The number of states that currently have identical or comparable versions of Rule 41 project a persuasive national consensus which rejects a substantially unfettered right to nonsuit or voluntary dismissal. This consensus is consistent with the previously discussed impetus behind Rule 41, namely, to curb the recognizable abuses of a substantially unfettered right to nonsuit such as that still existing in Virginia. The federal rule "limits the right of dismissal at the behest of the plaintiff to the early stages of the proceedings, thus curbing the abuse of this right that commonly had occurred under state procedures."<sup>571</sup> The compelling reasoning that prompted the federal rule has persuaded many states to follow it. For example, in Maryland, prior to incorporating Rule 41 as Maryland Rule 2-506, a plaintiff could unilaterally dismiss his action at any time prior to the introduction of evidence at trial. The reason why the old Maryland rule was changed is persuasively explained by the Court of Special Appeals in *Owens-Corning Fiberglas Corp. v. Fibreboard Corp.*:

The old Rule was changed because it gave "the plaintiff control over the court's trial docket and over the judge and jury before whom the case was to be tried. If the plaintiff was dissatisfied with the appearance of the jury panel or with the judge to whom the case was assigned, he simply filed a notice of dismissal without prejudice. The lawsuit would be filed again shortly thereafter, commencing the case once again from the beginning. This obviously operated to the prejudice of the parties and the court."<sup>572</sup>

Trials should be conducted on a level playing field for all litigants. Nonsuit, however, tips the field to the plaintiff—a situation long overdue for change.

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570. See, e.g., CA. CIV. PRO. CODE § 1 (West 2007); 735 ILL. COMP. STAT. 5/2-1009 (2013); MO. R. 3-506 (2013); NEV. R. CIV. P. 41(a) (2013).

571. 9 WRIGHT & MILLER, *supra* note 83, at § 2363; accord 5 MOORE, *supra* note 135, ¶ 41.02[1], at 41–14.

572. *Owens-Corning Fiberglas Corp. v. Fibreboard Corp.*, 620 A.2d 979, 982 (Md. Ct. Spec. App. 1993) (quoting P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY 351 (2nd ed. 1992)).

The Supreme Court of Virginia, has not directly advocated for a Virginia analog to Rule 41, but recently appeared to subtly support one. In *Inova Health Care Services*, the court highlighted the benefit conferred upon a plaintiff in taking a nonsuit of right and contrasted it with the concomitant detriment to both the defendant and judicial dockets:

The right to take a nonsuit on the eve of trial, notwithstanding a defendant's loss of time and expense incurred in preparation, and notwithstanding any disruption which may result to the court's docket, is a powerful tactical weapon in the hands of a plaintiff. The General Assembly has provided, in Code § 8.01-380, several conditions to give balance to the exercise of that right. Nonsuit remains, however, distinctly a weapon in the arsenal of a plaintiff.<sup>573</sup>

However, the fact of the matter is that the General Assembly's efforts to "give balance to the exercise of [the right to a nonsuit]" have not produced the balance that is fundamental and essential to a truly just, fair, and equitable judicial system in Virginia. In contrast, that balance has been supplied to the federal judicial system through Rule 41, as the court in *Inova Health Care Services* expressly recognized when it quoted the United States Court of Appeals for the Third Circuit in *Ockert v. Union Bare Line Corp.* in a discussion of the federal rule for voluntary dismissals:

While it is quite true that the practice in many states has permitted a voluntary non-suit as of right at advanced stages in the litigation, sometimes even after submission of a case to a jury, we think the object of the federal rules was to get rid of just this situation and put control of the matter into the hands of the trial judge.<sup>574</sup>

This is persuasive reasoning for Virginia to do the same.

While current Virginia Code section 8.01-380(C), and the earlier amendments to section 8.01-380, were steps in the right direction, they were too tentative, and the bills introduced in the 2013 General Assembly suffer from the same failing. The enactment of failed 2013 H.B. 1773, with its proposed addition of a new section 8.01-380(E), would have been a significant step forward in the process of eliminating the litigation imbalance that still exists in

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573. *Inova Health Care Servs. v. Kebaish*, 284 Va. 336, 344, 732 S.E.2d 703, 707 (2012) (citing *Trout v. Commonwealth Transp. Comm'r*, 241 Va. 69, 73, 400 S.E.2d 172, 174 (1991)).

574. *Id.* at 344–45, 732 S.E.2d at 707 (quoting *Ockert v. Union Bare Line Corp.*, 190 F.2d 303, 304 (3d Cir. 1951)).

section 8.01-380, had it not died in subcommittee, but the 2013 enactment of H.B. 1709/S.B. 903 did not rise to such a level.<sup>575</sup> The real solution, however, is not the General Assembly's periodic attempts to shape and polish that statute piecemeal, but to repeal it in its entirety. It is long past the time for Virginia to join Maryland and its sister jurisdictions, including West Virginia,<sup>576</sup> and adopt the essence of Rule 41 for the Commonwealth.

### XIII. CONCLUSION

Despite the recognition of voluntary nonsuit by common law and statute for hundreds of years, it has become an insupportable anachronism, unduly burdensome to defendants and the judicial system, and is in need of revamping. Accomplishing this will require legislative action which may be more likely in the near future, given the General Assembly's willingness to consider modernizing Virginia's judicial system through such innovative undertakings as the 2013 enactment of H.B. 1709/SB 903 and other legislation as part of a "Tort Reform Package," and the earlier enactment by the 2005 General Assembly of S.B. 1118, creating a single form of pleading for all actions in circuit court.<sup>577</sup> Even more encouraging is the enactment by the 2005 General Assembly of S.B. 1123 which, in effect, incorporated into the new Virginia Code section 8.01-286.1 the provisions of Rule 4(d) of the Federal Rules of Civil Procedure, as recommended by the Boyd-Graves Conference.<sup>578</sup> Hopefully, the General Assembly's implicit adoption of Rule 4(d) reflects that it may be but a short step to its future adoption of Rule 41.

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575. See *supra* Part V.C.

576. See W. VA. R. CIV. P. 41 (2009).

577. See Act of Mar. 23, 2005, ch. 681, 2005 Va. Acts 957, 957 (codified as amended at scattered sections of VA. CODE ANN. (Cum. Supp. 2005)).

578. See Act of Mar. 28, 2005, ch. 866, 2005 Va. Acts 1489, 1489-90 (codified as amended at VA. CODE ANN. § 8.01-286.1 (Cum. Supp. 2005)); see also FED. R. CIV. P. 4(d).