



# LITIGATION NEWS

**VS**

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## “Thank You, Sir, May I Have Another?” — Refiling Claims After a Nonsuit

by Dana R. Cormier

All defense counsel have experienced the same frustration when a plaintiff files a Motion for Nonsuit after months, sometimes years, of pretrial preparation and discovery. For plaintiff’s counsel, the absolute right to take a nonsuit on the eve of trial is a powerful tactical weapon.<sup>1</sup> At common law, a nonsuit was simply the discontinuance of a case without a decision on the merits and with no prejudice to the plaintiff’s right to recommence the case at a later date.<sup>2</sup> Statutes now govern nonsuits and limit the circumstances under which a plaintiff may take a nonsuit and the time periods for refiling nonsuited claims.

Under Virginia Code § 8.01-380, a plaintiff is entitled to one nonsuit as a matter of right:

A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision...

...Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits...

A nonsuit is not a decision on the merits; a nonsuit simply puts an end to the pending action without barring a subsequent lawsuit on the same cause of action.<sup>3</sup> For an action to be “submitted to the court,” thus precluding a nonsuit, the parties, by

counsel, must have yielded the issues to the court for consideration and decision.<sup>4</sup> However, the Virginia Supreme Court has not considered every possible situation in which an action would or would not be “submitted” to the court under the nonsuit statute.<sup>5</sup>

Under Virginia Code § 8.01-229(E)(3), the statute of limitations is tolled for the plaintiff’s nonsuited claims if the plaintiff refiles within six months of the nonsuit order:

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

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