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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.¹ 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.² 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.³ 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.⁴ 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.⁵

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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Letter from the Chair

A New Bar Year

The 2002-2003 Board of Governors of our Section held its first meeting last month, and I am gratified to be leading a team of such capable colleagues. Each of our members appreciates the opportunity to represent you, the trial bar, and we all welcome your comments concerning what the Litigation Section can do to support your practice.

We have a full agenda this year. We expect to have our web page up and running next year, and this will enable the board to have more input from our large, and growing, membership. Our section has 2,752 members. In addition to opening lines of communication, the web page will provide access to past articles from *Litigation News*. *Litigation News* is perhaps the most significant benefit afforded our members, and Lee Livingston expects to publish four new issues in the coming year.

Kevin Mottley has invigorated the Young Lawyers Section and with the Board's support, in conjunction with Virginia CLE, he is planning an outstanding CLE on March 19, 2003. *Deposition Strategies, Tactics & Techniques*, featuring David G. Markowitz of Portland, Oregon, will be held at the Richmond Marriott from 9:00 a.m. to 4:30 p.m. This seminar will provide a unique opportunity for attendees to participate in a workshop and sharpen their deposition technique. Space is

limited to 48 persons, and we are keeping advertisement of this cutting edge CLE limited to our members for an initial offering period. Register today with the form on the inside back cover of this issue if you wish to attend.

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Your Board voted to continue sponsoring the *Law and Society* essay competition in high schools around the Commonwealth. We provide judges for the essays as well as funding for prizes and advertising. This has been a successful program that has reflected well on the bar, and drawn interest from many young people who may be considering a legal career.

The section's program, *Winning Appellate Strategies*, was accepted for presentation at the Virginia State Bar's 29th Annual Mid-Year Legal

Seminar, November 8-17, 2002 in Florence and Rome, Italy. Panelists at the seminar will be Virginia Supreme Court Justice Barbara M. Keenan; the Honorable Theodore J. Markow, 13th Judicial Circuit, Richmond; and Frank K. Friedman, Woods, Rogers & Hazelgrove, PLC, Roanoke, who is immediate past chair of this section.

I look forward to serving the Board of Governors in this section this year. Please feel free to call me anytime with comments or suggestions.

Thomas E. Albro
Chair, Litigation Section

Rule 4:1(b)(3) and the Meaning of Anticipation of Litigation

by Humes J. Franklin, III

In today's litigious society, it is not uncommon for an individual or institution to find themselves in a situation that may result in litigation. Presented with such a possibility, the prudent person will take precautionary and preparatory measures in the event the situation does not resolve and litigation follows. The fruits of these anticipatory measures are often the subject of discovery requests once the lawsuit is initiated. Whether the opposing party is able to obtain these materials depends largely on the venue in which the lawsuit is filed.

Rule 4:1(b)(3) of the Rules of Supreme Court of Virginia protects from discovery materials produced in anticipation of litigation. It states, in pertinent part that:

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Circuit courts have taken differing views of the meaning of the phrase "in anticipation of litigation." While the appellate courts have not yet squarely addressed this issue, there has been considerable attention given to this issue by several circuit courts. This article outlines recent opinions interpreting Rule 4:1(b)(3)'s phrase "in anticipation of litigation." It is instructive to outline the approach of some of these courts.

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Rule 4:1(b)(3) and Unrestricted Discovery

The Circuit Court for the City of Charlottesville was presented with an issue that is often the subject of Rule 4:1(b)(3) debates in *Wood v. Barnhill*.¹ In *Wood*, the plaintiff moved to compel statements made to an insurer. After reviewing the relevant case law *sua sponte*,² the court ruled that "absent a showing to the contrary, statements made to an insurance company prior to litigation are not subject to the work product privilege."³ In reaching this decision, the court stated:

In the absence of any contrary showing, this court holds that routine accident reports following an accident should not be subject to work product protection. Ordinary reports are made in the regular course of business and do not rise to the level of "mental processes" involved with the strategizing of a legal defense.⁴

The court's holding in *Wood* was in line with its prior holding in *Tanner v. Evans*,⁵ in which the court ordered the defendant to identify all communications with insurance carriers prior to litigation. The court distinguished its decision in *Wood* from its prior holding in *Economos v. K-Mart Corp.*,⁶ in which the court found an accident report not discoverable because the investigation of the accident was conducted "in the manner prescribed by a policy manual prepared in the anticipation of lawsuits."⁷

In 1997 the Circuit Court of Rockingham County in *Estabrook v. Conley* granted a plaintiff's motion to compel the statements of a defendant taken by his insurance carrier following an automobile accident.⁸ In that case, the insurance adjuster took the defendant's statement before the plaintiff had made or suggested a claim and prior to retaining counsel.⁹ The court held, "[i]f the matter was not significant enough to involve counsel with an eye to preparing a litigation defense, it is not in this Court's view entitled to the protection afforded by Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia."¹⁰

The next year the Circuit Court of Rockingham County in *Whetzel v. McKee* held, again, that an insurance adjuster's notes and

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recorded interviews are not protected under Virginia Supreme Court Rule 4:1(b)(3) where neither the plaintiff nor the defendant are being advised by counsel.¹¹ In *Whetzel*, the insurance adjustor took a recorded statement from the defendant two months after the accident and after being contacted by the plaintiff regarding his claim for medical bills. At the time of the recorded statement, neither the insurance company nor the plaintiff had retained counsel. The court, noting its prior holding in *Estabrook*, refused to reverse its position, stating that to do so would create

a new and clearly-defined exemption from the normal rules of discovery for insurance carriers by effectively ruling that all information obtained by an insurance carrier, even when counsel is not involved and no litigation has been filed and when the injured party, in many cases, has not even retained a lawyer would be automatically exempt from discovery because of the very nature of the insurance company's business.¹²

The court's ruling in *Whetzel* further clarified its position that materials produced prior to the retention of counsel would not be protected under Rule 4:1(b)(3).

In *Clark v. Winn Dixie*, the Circuit Court of Henry County ruled that a defendant's accident reports; internal memoranda generated by employers; and correspondence, handwritten notes and typewritten notes generated by employers that pertained to the case were not produced in anticipation of litigation and, therefore, were to be produced in discovery.¹³ The court noted the

paucity of Virginia state court appellate authority on the subject, and instead turned to federal case law for guidance.¹⁴ The court based its decision on language from *National Union Fire Ins. v. Murray Sheet Metal*,¹⁵ which stated:

The same public policy that prevents courts from narrowing the covenant absent a blue-pencil clause continues to apply if the covenant contains a blue-pencil clause. A blue-pencil clause likely violates public policy, because it attempts to force a court to draft a contract for the parties. Courts do not render advisory opinions; nor should they be in the business of writing contracts for private parties.

The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation. Thus, we have held that materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes, are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3).¹⁶

The court also quoted *State Farm Fire and Casualty Co. v. Perrigan*.¹⁷

The nature of the insurance business requires an investigation prior to the determination of the insured's claim. Most courts have held that statements taken by an insurance adjustor in the normal course of a claim are made during the regular course of the insured's business, not in anticipation of a trial, and are therefore discoverable.¹⁸

Relying on both *National Union* and *Perrigan*, the court in *Clark* required the defendant to produce the materials at issue. It was further unpersuasive to the court that one of

the documents had been stamped "Prepared in anticipation of litigation." As the court commented: "As my grandfather used to say, 'You can call a mule a 'Man o' war,' but that won't make him a racehorse.'"

The Circuit Court of Fairfax County in *Overton v. Dise* ruled that a statement interview of a defendant taken by his insurer the day after an

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Expert Testimony: Does It Matter Whether Virginia Adopts *Daubert v. Merrell Dow*?

by Harry M. Johnson, III

Scrutiny of expert testimony has undergone a transformation in the federal courts since the United States Supreme Court's landmark 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ Federal trial judges were directed to become "gatekeepers" to ensure that expert testimony be admitted only if both scientifically reliable and relevant. This gatekeeping function requires judges to understand and evaluate the scientific principles and methodologies underlying the proffered expert testimony.

In recent years, the United States Supreme Court has clarified that all experts must satisfy the *Daubert* test, not just experts espousing novel scientific theories. Evidentiary hearings have become commonplace in federal courts as experts' methodologies have become the subject of their own mini-trials. In less than ten years, *Daubert* has fundamentally changed the litigation of federal cases in which the admissibility of expert testimony is disputed.

Many states have adopted the *Daubert* approach,² but Virginia has not. In *John v. Im*,³ our Supreme Court was recently presented with the opportunity to adopt *Daubert*. The case, however, was decided on different grounds, and the Court expressly left the *Daubert* question "open for future consideration."⁴ This decision not to decide the issue has left many wondering whether our Court will eventually adopt the *Daubert* approach.

Harry M. Johnson, III is a partner on the Litigation-Intellectual Property-Antitrust Team of Hunton & Williams, Richmond, Virginia. He has litigated numerous *Daubert* challenges around the country in state and federal courts. Mr. Johnson would like to thank Christopher Gatewood, an associate at Hunton & Williams, for his valuable comments and assistance with the preparation of this article.

This article first compares the basic approach of *Daubert* with the general principles of Virginia law for evaluating expert testimony, and then posits that the eventual decision to either adopt or reject *Daubert* will not have any appreciable effect on the treatment of expert testimony in Virginia state courts.

Daubert and Its Progeny

The Daubert Standard

Faced with increasing controversy over expert witnesses and purported "junk science," the United States Supreme Court's *Daubert* decision established a new federal standard for the admissibility of expert testimony under Fed. R. Evid. 702. The Court rejected the traditional *Frye* test, which made "general acceptance" in the relevant scientific community a precondition to admitting testimony of a qualified expert.⁵

As an initial matter, the Court in *Daubert* recognized the difficulties presented by expert testimony for a lay jury. On one hand, the traditional tools of cross-examination and presentation of contrary evidence are hallmarks of our adversarial system.⁶ On the other hand, expert testimony "can be both powerful and quite misleading because of the difficulty in evaluating it."⁷ Ultimately, the Supreme Court concluded that the trial court must assume a "gatekeeping role" and undertake its own preliminary assessment of proffered expert testimony before admitting it into evidence.⁸

Daubert requires a trial judge to make two findings in her role as gatekeeper before admitting expert testimony. First, the federal trial judge must be persuaded that the testimony represents "good science." It must be the product of "scientific knowledge...derived by the scientific method."⁹ Second, the testimony must "fit" the case; that is, it must be relevant.¹⁰

The first prong is the most controversial and has received the lion's share of attention in the decade since *Daubert*. Are judges now amateur scientists required to differentiate between "good" and "bad" science? If so, how are they to approach this daunting task?¹¹ Perhaps anticipating the out-

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