"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. 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. 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. 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. 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.

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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A New Bar Year

Letter from the Chair

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.

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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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 employees; 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
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.

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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cry, the Court in *Daubert* suggested five factors to consider when assessing the scientific validity of an expert's opinions:

- Can the technique or theory be tested and has it been tested?
- Has the technique or theory been subjected to peer review?
- What is the known or potential rate of error?
- Are there standards or controls governing the techniques?
- Is the technique or theory "generally accepted" within the scientific community?12

These factors do not represent a "definitive checklist or test," and other unspecified factors may bear on the inquiry in any particular case.13

The Court further admonished trial judges that their focus must be solely on the principles and methodology underlying the expert's opinion, and not on the conclusions themselves.14 As long as the expert's opinion is the product of reliable scientific methods, it is the jury's role to decide whether to accept or reject the conclusion.

In the wake of *Daubert*, important questions arose as litigants and judges struggled to apply the new standard in actual cases. The questions included the following: Does the *Daubert* standard apply only to novel scientific theories or does it apply to all expert testimony? What if the expert recites a valid methodology, but then reaches a conclusion at odds with the faithful application of the methodology? Is it sufficient for the expert himself to assert that his methods are scientifically reliable? Finally, to what extent do the five *Daubert* factors constrain a judge's evaluation of an expert's proposed testimony?

This article submits that a close examination of the post- *Daubert* federal cases answering these questions reveals an underlying substantive similarity between modern federal law and traditional Virginia law, despite the differences in conceptual framework and semantics.

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**Daubert Applies to All Experts**

To many, the focus of *Daubert* appeared to be exclusively on highly technical, novel scientific testimony. They believed that *Daubert* applied to experts in such arcane fields as epidemiology and teratology in toxic tort suits, not to traditional areas of expert testimony such as engineering design in products liability cases or orthopaedic medicine in automobile cases.15 Others disagreed, and a split in the federal circuits ensued. The Supreme Court answered the question in *Kumho Tire Co. v. Carmichael*.16 All expert testimony is subject to Fed. R. Evid. 702, and therefore *Daubert*'s requirement of reliability likewise applies to all expert testimony.17 *Kumho Tire* involved a products liability claim in which plaintiffs had proffered a tire failure analyst to testify about the cause of a blow-out. After finding that *Daubert* applied, the Supreme Court scrutinized the expert's methodology and concluded that he had not applied the methodology in a reliable way.18 Consequently, the expert had been properly excluded.19 More important, the Court's detailed analysis of the expert's methodology made clear that all experts would be required to establish the reliability of their opinions regardless of their field.

**The Expert Must Not Just Recite a Reliable Methodology, He Must Follow It**

*Daubert* unintentionally created problems for trial judges by attempting to draw bright line distinctions between methodology and conclusions. The Court had emphasized that the focus of the district courts' inquiry "must be solely on principles and methodology, not on the conclusions that they generate."20 This admonition has generated much debate in specific cases over the classification of an expert's testimony as either "methodology" or "conclusion."21 If the testimony is a "conclusion," the proponent of the evidence argues that the trial judge should not even consider it.22

Although the *Daubert* focus remains on the expert's methodology, two subsequent developments have lessened the importance of classifying testimony as either "methodology" or "conclusion." First, the Supreme Court has now expressly
auto accident was not prepared in anticipation of litigation.19 "While it is true that sometimes materials may be prepared both in anticipation of litigation and in the ordinary course of business, the Court finds that this was not the case. The Statement Interview in question was the day after the accident in the ordinary course of business and is not subject to the protection afforded by Rule 4:1(b)(3).”20

In Whetzel, the court stated that its reluctance to reverse its prior holding in Estabrook was out of a concern that all information obtained by insurance carriers would be exempt from discovery “even when counsel is not involved” and “no litigation has been filed” and when in many cases “the injured party has not even retained an attorney.”21 In Wood, the court refused to consider granting 4:1(b)(3) protection to materials that did “not rise to the level of mental processes involved with the strateging of a legal defense.” The courts in Clark and Overton would not label as “in anticipation of litigation” those materials produced in the ordinary course of the defendant’s or agent’s business. Thus, courts that hold have ordered production of materials under Rule 4:1(b)(3) and have each set forth fairly straightforward bright line rules that they use to determine whether documents are produced in anticipation of litigation.

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

Other circuit courts have supported the proposition that accident reports, investigation reports, statements by the defendant, and the like, that are in the possession of the defendant or his or her insurance carrier, are considered to have been prepared in anticipation of litigation and, hence, are privileged work product pursuant to Rule 4:1(b)(3).22

In Smith v. National Railroad, the plaintiff sought discovery of, among other things, any report of investigations conducted by the defendant prior to the time suit was filed.23 The court opined that the appropriate test for determining whether materials were prepared in anticipation of litigation is whether litigation was “reasonably foreseeable” at the time the documents were prepared.24 “To determine whether a result was reasonably foreseeable, the [Virginia Supreme Court] has applied the following test: ‘looking at the consequences, were they so improbable or unlikely to occur that it would not be fair and just to charge a reasonably prudent man with them.’”25 National Railroad involved a personal injury action brought against a railroad company by an employee who was injured on the job. Concluding that the information sought was prepared in anticipation of litigation, the Court stated that “...in the face of the event which gave rise to the motion for judgment, a reasonably prudent railroad employer could anticipate litigation as a result, making the reports which were produced from the investigations of the accident work product protected by Rule 4:1(b)(3).”26

The court in Hedgepeth v. Jesudian, et al.,27 likewise adopted the reasonably foreseeable interpretation, explaining that the term “anticipation” “applies to those facts and circumstances which would lead a reasonable person to believe that he or she is likely to be or may be involved in litigation...” If all documents that are prepared prior to the date suit is actually filed are discoverable, then the phrase “in anticipation of litigation” would, in effect, apply only to pending litigation.

It is unlikely that the Supreme Court will resolve this issue anytime soon. The Rule 4:1(b)(3) challenges occur in the form of discovery motions prior to trial. The General Assembly’s recent interlocutory statute allows for the appeal of an order or decree entered by the trial judge that is not otherwise appealable.
recognized that the distinction is often nebulous: “conclusions and methodology are not entirely distinct from one another.” The distinction is blurred when an expert recites a valid and reliable methodology, but nevertheless leaves a large “analytical gap” between the methodology and the conclusion. Speculation and unsupported assumptions can create this impermissible gap, and exclusion of such opinions is within the discretion of the trial court. Second, Fed. R. Evid. 702 has been amended to recognize the importance of faithfully applying a methodology to the facts of the case to reach a conclusion. For expert testimony to be admissible, the witness must have “applied the principles and methods reliably to the facts of the case.” Again, speculation and guesswork do not meet this standard.

For obvious reasons, it is common for a proposed expert to testify that his methodology is generally accepted, accurate, and reliable. The Supreme Court has made clear that this self-serving testimony is not sufficient to establish the admissibility of the expert’s opinion. In General Electric Co. v. Joiner, the Supreme Court stated the following:

Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.

It is the function of the trial judge to determine whether the facts of the case have been properly considered in reaching the expert’s conclusions.

Consequently, federal courts are required to go beyond simply an analysis of the expert’s stated method. The court must determine whether the conclusion is the natural product of the methodology as applied in the particular case. Moreover, the court must evaluate whether the expert has incorporated the facts reliably in reaching his conclusions.

Adopting Daubert would have little substantive effect for two primary reasons. First, both the federal and Virginia tests focus on the same characteristic of expert testimony – reliability. Second, Virginia judges already scrutinize expert testimony with as critical an eye as most federal judges. A Daubert approach would not introduce any heightened review.

Federal Trial Judges Are Not Limited by the Daubert Factors

In the years immediately after Daubert was decided, lawyers and courts responded to the new regime by mechanically reciting the five Daubert factors whenever an expert was challenged. Both briefs and court opinions followed templates setting forth the individual factors and analyzing the expert’s testimony in light of each factor. It became increasingly clear, though, that the five factors were not always helpful in achieving the goal of Daubert — to evaluate the reliability of a particular expert’s testimony in a specific case.

The Supreme Court responded in Kumho Tire by reiterating that Daubert’s inquiry was expressly intended to be “flexible.” Daubert itself had made clear that the five factors were not a “definitive checklist or test” and that the inquiry was case-specific and expert-specific. Rather than applying some rigid checklist, the trial judge must use his discretion to determine the factors necessary to establish reliability:

The conclusion, in our view, is that we cannot neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Experts in federal courts are evaluated on a case-by-case basis, and the relevant factors bearing
on reliability will differ depending on the nature of the field of expertise.

Principles of Virginia Law on Expert Witnesses
The admissibility of expert testimony in Virginia state courts is governed by Va. Code Ann. § 8.01-401.3(A):

In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Like the prior version of Federal Rule 702, the Virginia statute provides only vague guidance as to how judges should assess expert testimony from a qualified witness. The proffered evidence must "assist the trier of fact to understand the evidence or to determine a fact in issue." What standard is used to determine whether expert testimony will "assist" the trier of fact? Our Supreme Court has developed a substantial body of case law to answer this question.

First and perhaps foremost, the proposed expert testimony must not be speculative. Speculative expert testimony is not admissible. The Supreme Court has expressed this concept in different ways. It is a "fundamental requirement" that expert testimony "be based on an adequate factual foundation." Similarly, expert testimony is inadmissible if "founded on assumptions that have an insufficient factual basis."

A second related threshold question is whether the expert has considered "all the variables that bear upon the inferences to be deduced from the facts observed." The seminal decision in the "missing variable" line of cases is Grasty v. Tanner. In that case, an accident reconstructionist was permitted to testify at trial about the speed of a vehicle involved in a collision based on examination of photographs, damage to the vehicle, the weight of the vehicle and its occupants, and application of fundamental principles of physics. The Supreme Court ruled the testimony inadmissible, because the expert had not considered all the variables bearing on his ultimate conclusion. For instance, the expert estimated the weight of the occupants and did not know the weight of the gasoline in the tank.

The significance of the missing variable cases goes beyond experts testifying based on mathematical equations or physics. All experts must consider and include in their analysis those facts that are necessary to reach a reliable conclusion. As the Supreme Court noted in Speier v. Overby, a trial court has an obligation "to determine whether the factors required to be included in formulating the opinion were actually utilized." Although employing different language, the Virginia Supreme Court's analysis is the functional equivalent of the requirement in Fed. R. Evid. 702(1) that "the testimony is based on sufficient facts and data." (Emphasis added.)

Treatment of Scientific Evidence by the Supreme Court of Virginia
The advent of DNA testing in the 1980s resulted in several capital murder cases challenging the admissibility of novel scientific evidence. These cases are important in understanding the functional similarities between Virginia law and federal law.

In Spencer v. Commonwealth, the Court reviewed the trial judge's responsibility to establish reliability when presented with scientific evidence: When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered...

Spencer further explained that the trial judge must usually rely on expert testimony to establish the reliability of the proffered scientific evidence. In language reminiscent of Daubert's later statements about the judge's role as "gatekeeper," Spencer held that the trial court must determine "whether the evidence is so inherently unreliable that a lay jury must be shielded from it."

In O'Dell v. Commonwealth, the Supreme Court of Virginia declined to adopt the Frye test of general acceptance in the scientific community, finding "no reason" to do so. The Court made clear that general acceptance is not necessary as long as the trial court finds the scientific evidence to be reliable. General acceptance may be one factor for the trial court to consider in evaluating reliability, but
Virginia courts have declined to make it the *sine qua non* for admissibility. Again, the reasoning of the Court seems to have foreshadowed the United States Supreme Court’s analysis in *Daubert*.

**The Adoption of *Daubert* Would Not Have a Substantive Effect on Litigation in Virginia Courts**

If the Supreme Court of Virginia were to adopt *Daubert* as the standard for admissibility of expert testimony, there would undoubtedly be changes. The language of motions and briefs would change; the language of cross-examinations would change; litigants would cite more federal case law to Virginia trial judges. But, these changes would be superficial. Rarely would a Virginia court reach a different decision on admissibility by applying *Daubert* instead of Virginia’s traditional rules. Thus, the substantive effect of *Daubert* would be marginal at best.

Adopting *Daubert* would have little substantive effect for two primary reasons. First, both the federal and Virginia tests focus on the same characteristic of expert testimony — reliability. Second, Virginia judges already scrutinize expert testimony with as critical an eye as most federal judges. A *Daubert* approach would not introduce any heightened review.

**The Substantive Test of Admissibility Is the Same in Federal and Virginia Courts**

As has been noted throughout this article, both Virginia and federal courts examine the reliability of an expert’s testimony when deciding whether to admit it. But the similarities go deeper. The courts employ the same basic reasoning process in evaluating reliability.

For instance, experts who engage in speculation and guesswork will not be allowed to testify at trial. In federal court, this would be characterized as failing to apply “the principles and methods reliably to the facts of the case,” or testifying without “sufficient facts or data.” In state court, it would be characterized as offering opinions with “an insufficient factual basis.” Either way, the result is the same.

Likewise, the expert must apply the scientific methods reliably to the facts of the case regardless of the forum. Virginia courts have frequently analyzed this in the context of “missing variables,” where the expert must demonstrate that her methodology incorporates all the relevant facts of the case in a reliable way. Although federal courts do not employ this same language, the underlying analysis is the same.

Regardless of the stated legal standard, a trial judge will inevitably ask the same question when faced with a challenge to expert testimony: *Is this junk science?* The evidence presented in favor of or against admissibility will be the same under either the federal or state standard. If a scholarly article bears on the reliability of the expert’s opinions, it will be offered to the trial judge. If the expert has assumed facts contrary to the record in the case, it will be brought to the court’s attention. The parties may cite different cases and use different language in one forum or another, but in the end, a trial court will exclude what it considers junk science and will admit reasonably reliable science. The substantive result, therefore, is not dependent on the test used. The result depends on the quality of the expert testimony.

**The Procedures and Depth of Analysis Would Not Change Meaningfully Under *Daubert***

Even if the ultimate results would not be different under a *Daubert* regime, one may be legitimately concerned about potentially dramatic procedural changes. Yet, the state courts in Virginia are probably much closer to the federal procedure than many lawyers realize.

One of the original criticisms of *Daubert* was that it thrust judges into the position of becoming experts themselves in order to evaluate expert testimony. A review of Virginia cases demonstrates that Virginia courts already scrutinize the underlying scientific principles when questionable expert testimony is offered. The scientific basis for the various forms of DNA testing was examined in great detail by the Supreme Court of Virginia. The Court has similarly probed the methods and procedures of experts in civil cases. Therefore, *Daubert* likely would not change the existing level
of care with which Virginia courts approach questions of reliability and admissibility.

Daubert has also led federal courts to conduct “Daubert hearings” in which evidence is taken on the issue of scientific reliability. Would the adoption of Daubert in Virginia prompt a wave of mini-trials on the issue of scientific reliability? Probably not. The Virginia trial courts have long had an obligation to make “a threshold finding of scientific reliability when unfamiliar scientific evidence is offered.”48 This threshold decision can be made at a pretrial hearing or at trial outside the jury’s presence, and expert evidence on reliability is often appropriate. There is no reason to believe that the adoption of Daubert would alter the traditional practice.

Conclusion

Virginia state courts will continue to confront the argument that they should adopt the Daubert analysis. Eventually, the Supreme Court will decide the issue conclusively. While this will appear to be a momentous decision, it should have little or no effect on the outcome of cases. As in the federal system, some judges will continue to be more liberal in allowing expert testimony, whereas others will be quite demanding and restrictive. Some judges will expect substantial evidence to be presented during a challenge to expert testimony, whereas others will resist the creation of mini-trials. The discourse may change, but the results will not.


The highest courts in Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wyoming have followed Daubert’s approach to expert testimony.

8 Id. at 597.
9 Id. at 590.
10 Id. at 616.

11 Indeed, Chief Justice Rehnquist, writing separately and dissenting in part in the Daubert opinion, criticized the majority for turning trial court judges into “amateur scientists.” 509 U.S. at 600-01.
12 Daubert, 509 U.S. at 594.
13 Id. at 593.
14 Id. at 595.

17 Id. at 147-48.
18 Id. at 153-58.
19 Id.
20 Daubert, 509 U.S. at 595.
22 Id.
23 Joiner, 522 U.S. at 146.
24 Id.
25 Id.
26 Fed. R. Evid. 702(3).
27 522 U.S. at 146.
28 526 U.S. at 150, quoting Daubert, 509 U.S. at 594.
29 Id., quoting Daubert, 509 U.S. at 591, 593.
30 Id.
36 Id. at 727, 146 S.E.2d at 255. See also Smiley v. Overby, 237 Va. 231, 377 S.E.2d 372 (1989) (expert testimony about vehicle’s stopping distance inadmissible because expert did not know condition of brakes).
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Schuch, John W. Note. *ERISA Preemption of State Tort Law Claims Against Managed Care Entities.* 67 Brook. L. Rev. 1221-1248 (2002).
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Remedies


Torts

original period of limitation, or within the limitation period as provided by subdivision B 1, 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.

The Virginia Supreme Court has held that this tolling provision applies only to a statute of limitations and not to a limitation period fixed by contract.6

Simple enough? Of course not. In recent years Virginia state and federal courts have been called on to determine what claims have actually been submitted prior to a nonsuit, whether dismissed claims may be revived after a nonsuit and whether new claims following a nonsuit are subject to the tolling provisions of § 8.01-299(E)(3).

Reviving Dismissed Claims

In Winchester Homes, Inc. v. Osmose Wood Preserving,7 the Fourth Circuit held that § 8.01-380 allowed a plaintiff to refile dismissed claims after taking a nonsuit. The Court of Appeals reasoned that an order of nonsuit rendered the entire lawsuit moot and that the trial courts dismissed orders prior to the nonsuit had no preclusive effect.8 A nonsuit leaves the situation as if the suit had never been filed and carries down with it previous rulings and orders in the case.9 The Court of Appeals also stated that a prohibition on the refiling of dismissed claims after a nonsuit would penalize the taking of the nonsuit by making the plaintiff forego her statutory right to appeal all prior orders after final judgment.10

Though the Virginia Supreme Court had not, at the time, expressly allowed the reversal of dismissed claims after a nonsuit, the Fourth Circuit inferred this rule from the decision in Spotsylvania School Board v. SeaBoard Surety Insurance Co.11 In Spotsylvania, the Virginia Supreme Court held that when a demurrer was overruled, or when a motion for summary judgment was denied, a subsequent nonsuit rendered the issues raised by the demurrer or motion for summary judgment moot and thus such issues were not subject to appeal.12

However, after the Fourth Circuit’s decision in Osmose, the Virginia Supreme Court did rule on the specific issue of whether a dismissed claim could be revived after a nonsuit. In Dalloul v. Agbey,13 the Virginia Supreme Court held that any claim dismissed with prejudice could not be revived following a nonsuit. The Court interpreted § 8.01-380 to allow a nonsuit only for actions “pending before the court.”14 A dismissal with prejudice is generally as conclusive of the party’s rights as if the action had been tried on the merits with the final disposition adverse to the plaintiff.15 Thus, the “action” subject to a plaintiff’s nonsuit request is comprised of the claims and parties remaining in the case after any other claims and parties have been dismissed with prejudice or otherwise eliminated from the case.16

Furthermore, the Virginia Supreme Court did not agree with the Fourth Circuit that prohibiting the revival of dismissed claims after a nonsuit would prejudice a plaintiff’s right of appeal. Once a trial court enters a nonsuit order, the case is concluded as to all claims and parties. Since nothing remains to be done in the case, the plaintiff can then appeal the dismissal order.17

The Virginia Supreme Court also distinguished the Spotsylvania case from which the Fourth Circuit had inferred the rule allowing revival of a dismissed claim following a nonsuit. In Spotsylvania, the Virginia Supreme Court held that any issues raised in a demurrer or motion for summary judgment

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In Dalloul v. Agbey the Virginia Supreme Court held that any claim dismissed with prejudice could not be revived following a nonsuit.... Furthermore, the Virginia Supreme Court did not agree with the Fourth Circuit that prohibiting the revival of dismissed claims after a nonsuit would prejudice a plaintiff’s right of appeal.
remain intact for adjudication once the demurrer is
overruled or the motion for summary judgment is
denied. Thus, a subsequent nonsuit does not render
such issues appealable because the issues can be
revived in any claim following the nonsuit. However, in
Agbey, the Virginia Supreme Court distinguished a
dismissal with prejudice from an unsustained
demurrer or denied motion for summary
judgment: a dismissal with prejudice constitutes a
final disposition of the relevant issues on the
merits. An unsustained demurrer or denied
motion for summary judgment has no such finality.
Therefore, reviving dismissed claims after a nonsuit
of the surviving claims would amount to circumven-
tion of the original dismissal order.

**Tolling the Statute of Limitations Following a Nonsuit**

Pursuant to *Agbey*, dismissed claims cannot be
revived after a nonsuit taken pursuant to Virginia
code § 8.01-380. However, whether new time-
barred claims added after a nonsuit are subject to
the tolling provision of § 8.01-229(E)(3) may still
be the subject of dispute.

In *Smith v. Consolidated Coal Co.*, the
District Court for the Western District of Virginia
construed the *Agbey* decision in order to deter-
mine whether a new claim following a nonsuit was
barred by the statute of limitations. The plaintiffs
had originally filed a Motion for Judgment in the
Circuit Court of Tazewell County asserting claims
arising from alleged violations of Virginia's surface
mining regulations. These claims were dismissed
with prejudice and the plaintiff took a nonsuit with
respect to his remaining claim.

When the plaintiff refiled his claims in federal
court, he argued that he was entitled to take ad-
vantage of the tolling provisions for nonsuited claims
and reassert the previously dismissed claims. Applying *Agbey*, the district court found that the
plaintiff's nonsuit did not overcome the state court
dismissal with prejudice so as to allow him to
reassert the dismissed claims. The district court
found that *Agbey* had overruled the Fourth Circuit's
analysis of relevant Virginia jurisprudence in
*Winchester Homes Inc.*

Then, to determine whether the plaintiff's new
claims were barred under res judicata principles
based upon their relationship to the previously dis-
missed claims, the district court stated that the test
to determine whether claims are a part of a single
cause of action in whether the same evidence is
necessary to prove each claim. Finding that the
plaintiff's new claims were identical to the previ-
ously-dismissed claims, the district court dismissed
the revived lawsuit in its entirety.

Likewise, in *Ritchie v. Norton Community Hospital*, a state circuit court also considered
what amendments, if any, would be allowed in a
revived suit following a nonsuit. The circuit court
held that the amendments to a revived action after
a nonsuit should be controlled by Virginia Code
§ 8.01-6.1, which permits pleading amendments
to relate back to original pleadings to avoid the
statute of limitations. Virginia Code § 8.01-6.1
allows pleading amendments to relate back only if
the amended pleadings arose out of the conduct,
transaction or occurrence set forth in the original
pleading. In *Ritchie*, the circuit court applied
this rationale to nonsuits, stating that the revival of
a nonsuited action should be subject to the same
requirements as amended pleadings. The circuit
court then held that the pleadings in the revised
action met the requirements of § 8.01-6.1 and
were thus subject to the tolling provisions of 8.01-
229(E)(3).

Thus, to invoke the tolling provisions of § 8.01-
229(E)(3) and assert an otherwise time-barred
claim as an amendment to a previously nonsuited
claim, the new claim may be subject to two different
tests. Under the logic of *Smith*, if the new claim
requires the same evidence as the nonsuited claim,
the new claim is subject to the tolling provision of
§ 8.01-229(E)(3). Similarly, under the test used in
*Ritchie*, if the new claim arises out of the same
"conduct, transaction, or occurrence" as the non-
suited claim, the tolling provision for nonsuits are
applicable. Conversely, if a new claim following a
nonsuit requires the same evidence or arises from
the same "conduct, transactions, or occurrence" as a
claim that was dismissed before the nonsuit, the
new claim cannot be asserted with the previously
nonsuited claim.

Either way, astute defense counsel should care-
fully scrutinize any pleadings following a nonsuit

*Refiling After Nonsuit — cont'd on page 16*
Refiling After Nonsuit
cont’d from page 15

in order to smoke out any improper claims, whether previously asserted or added as amendments. Astute plaintiff’s counsel should be aware that the tolling provisions for nonsuited claims may not apply to new claims in a revived action. Absent guidance from the Virginia Supreme Court, or the General Assembly, whether a plaintiff may add new, time-barred claims and take advantage of the tolling provisions for nonsuited claims will continue to be a contentious issue.

5 Id.
7 37 F.3d 1053 (4th Cir. 1994).
8 Winchester Homes Inc., 37 F.3d at 1058.
9 Id.

Expert Testimony
cont’d from page 11

distinction between experts who testify merely as to general scientific or technical principles to educate the jury and those who apply such principles to the facts of the specific case).

39 Id. at 97, 393 S.E.2d at 621.
40 Id.
41 Id. at 98.
43 Id. at 696; 364 S.E.2d at 504-05.

10 Id. at 1058-59.
14 Dalloul at 255 Va. at 541, 499 S.E.2d at 281.
15 Id.
16 Id.
17 Dalloul, 255 Va. at 51, 499 S.E.2d at 282. The court also cited the “severable interest rule” whereby an order which is final as to some, but not all, parties may be appealed before the case is concluded as to all defendants. See e.g., Wells v. Whitaker, 207 Va. 616, 628 151 S.E.2d 422, 432-33 (1966); Laggert v. Caudill, 247 Va. 130, 134, 439 S.E.2d 350, 352 (1994).
18 Id.
20 Smith, 7 F.Supp.2d at 754.
21 Smith, 7 F.Supp.2d at 755.
23 Smith, 7 F.Supp.2d at 757.
26 Id.
27 Id.

44 Id.
47 See, e.g., John, 263 Va. at 319-21, 559 S.E.2d at 696-97; (QEEG testing of brain function); Tissworth, 252 Va. at 154-55, 475 S.E.2d at 263-64 (bio-mechanical effects of G-forces from collisions).
48 John, 263 Va. at 322 n. 3, 559 S.E.2d at 698 n. 3.
The Hedgepeth court specifically rejected this interpretation of Rule 4:1(b)(3), stating that if the Rule were construed to apply only to pending litigation, the “rule would be almost useless” and “would require anyone, particularly defendants, potential defendants, insurance adjusters, etc., to completely open files to discovery of materials obtained prior to the existence of litigation.”28 The court concluded that “incident reports” completed by the Medical College of Virginia regarding injuries suffered by the plaintiff while in the hospital’s care were produced in anticipation of litigation and were not discoverable by the plaintiff in an action for medical malpractice.

In Covington v. Calvin the court noted the distinction between materials prepared for trial and those prepared for litigation.29 The court refused to draw a “bright line” test that would protect from discovery only those materials produced after suit commences:

“Anticipation” denotes a future event. One “anticipates” litigation before it has begun, not after it has commenced. After litigation begins, materials ordinarily are prepared “for trial.” The fact that the Rule extends protection to materials prepared “in anticipation of litigation” as well as “for trial” — both phrases are used — strengthens this conclusion.30

Like the court in Clark, the court in Covington relied on the test articulated by U.S. District Court Judge Williams in State Farm Fire and Casualty Co. v. Perrigan31 to determine whether documents were produced in anticipation of litigation:

The Perrigan court concluded that this test “realistically recognizes that at some point an insurance company shifts its activity from the ordinary course of business to anticipation of litigation, and no hard and fast rule governs when this change occurs.” This distinction lies at the pivotal point “where the probability of litigating the claim is substantial and imminent.” Thus, the facts whether the insurance the insurance company’s investigatory reports are discoverable “depends upon the facts of each case.”32

The court adopted the approach taken by the court in Perrigan, without “necessarily adopting the ‘substantial and imminent’ port of the test.”33

Applying the test to the facts of the case in Covington, the court refused to order production of the complete investigatory files of an accident reconstruction consultant that had been requested by subpoena duces tecum. It was significant to the court that the materials in question were produced as a result of a multiple vehicle accident that involved a fatality.

In Ring v. Mikris,34 the court applied a three-pronged test to determine whether a document was prepared in anticipation of litigation. This test requires the party seeking to protect a document from discovery to show the document it seeks to protect (1) was prepared because of the prospect of litigation; (2) the preparer faces an actual or potential claim; and (3) the preparer could reasonably foresee the actual or potential claim would result in litigation.35 The court listed several factors to be used when applying this test. Among them were the severity of the plaintiff’s injuries; whether it is immediately apparent that the negligence, if any, would be solely with the insurance company’s insured; whether the plaintiff or the plaintiff’s family notified the defendant that a claim would be pursued; whether the plaintiff’s attorney notified the defendant that counsel had been retained; or whether the material sought was requested by an attorney, and whether the documents a party seeks to protect were produced before an insurer formally denied a claim.36

Applying the three-pronged test and relevant factors to the facts of the case in Mikris, Judge Frank held that the insurer’s report (including witness statements, diagrams, and photographs) was prepared in anticipation of litigation and denied plaintiff’s motion to compel.37 Judge Frank did find, however, that the plaintiff met the requisite showing of substantial need as to the photographs and ordered the insurer to produce them.38

The Fairfax County Circuit Court, in McCullough v. Standard Pressing Machines, held that a statement taken from a defendant by his insurance company three days after the accident at issue in that case was made in anticipation of litigation and was privileged as work product.39 The
court reasoned that in the case of liability insurance, an insured essentially obtains insurance to protect against liability claims of third persons. That liability, however, is an insured risk which — for all practical purposes — can only be established in favor of the third party against the insured by litigation in a court of law. Accordingly, when an insured is involved in an insured event occurrence, such as an automobile accident, reasonably giving rise to risk of liability, the liability insurer has an incentive to investigate the circumstances surrounding that occurrence in order to fulfill its obligation to its insured to defend against a third party potential action. 40

In support of its position, the McCullough court quoted Justice Breitel in Kandle v. Tocher, 41 who stated as follows:

once an accident has arisen there is little or nothing that the insurer or its employees do with respect to an accident report except in contemplation and in preparation for eventual litigation or for a settlement which may avoid the necessity of litigation. In this connection, therefore, it is immaterial whether attorneys have actually been assigned or employed by the insurer to represent the insured in the settlement or defense of the claim. For parallel reasons, it is immaterial whether the action based on the claim has been begun or not. On this view, automobile liability insurance is simply litigation insurance. 42

Erie provides insurance to the defendant for liability arising from the ownership, operation or maintenance of the insured vehicle. It follows that “[b]ecause liability insurance, unlike first party insurance, essentially constitutes ‘litigation insurance,...’” any statements, investigation reports or other documents prepared by employees of Erie since the date of the accident were made in anticipation of litigation and are therefore considered privileged work product. 43

The Loudoun County Circuit Court, in Larson v. McGuire, quoted both McCullough as well as National Railroad in holding that an insurance adjuster’s notes and reports of an accident are produced in anticipation of litigation and therefore are protected. 44 The court noted “the Rule 4:1(b)(3)] does not confine itself to the work product of the attorney but extends to others involved in the adversary process, including the party’s ‘consultant, surety, indemnitor, insurer, or agent.’” 45 The court held that “[w]hile the reports made by the adjuster containing statements made by witnesses other than the plaintiff are entitled to the claim of privilege, plaintiff has articulated a showing of need and demonstrable hardship requiring disclosure.” 46

Finally, in a recent Fairfax Circuit Court case, Alchaar v. Sanders, a case arising out of an automobile accident, the court denied the plaintiff’s motion to compel the documents reflecting statements made by the defendant to his insurance carrier. 47 In Alchaar, the court characterized Rule 4:1(b)(3) as a two-part test: “(1) the documents and tangible things to be produced must be prepared in anticipation of litigation; and (2) the party seeking discovery must have ‘substantial need’ of the materials sought.” 48 The court, without discussing the particular facts of the case, denied the plaintiff’s motion.

It is unlikely that the Supreme Court will resolve this issue anytime soon. The Rule 4:1(b)(3) challenges occur in the form of discovery motions prior to trial. The General Assembly’s recent interlocutory statute allows for the appeal of an order or decree entered by the trial judge that is not otherwise appealable. 49 Under this new statute the appealing party must file with the circuit court a statement of why an interlocutory appeal should be granted. This statement must include “a concise analysis of the statutes, rules or cases believed to be determinative of the issues” and request the court to certify that (1) there is a substantial ground for difference of opinion, (2) there is no clear controlling precedence on point, (3) determination of the issue would be dispositive of a material aspect of the proceeding currently pending before the court, and (4) the court, and the parties believe that it is in the parties best interest to seek the interlocutory appeal. 50 It is unlikely, however, that a discovery issue would satisfy the third or fourth prong of the certification requirement. Even if it did, the statute gives great deference to circuit courts in deciding whether to grant appeals of their own rulings.
The case may likely settle, or if not, the adverse ruling may not have been sufficiently harmful to prevent the aggrieved party from achieving victory at trial. Should the aggrieved party lose at trial, and the dissatisfied client want to appeal, the party bears the burden on appeal of showing judicial error and that abuse of judicial discretion adversely affected the party's trial. This presents a tough standard to meet. Due to the varying interpretations among circuits courts regarding Rule 4:1(b)(3), and the unlikely probability of the Supreme Court providing clarity on appeal, perhaps the best solution is for the Supreme Court to exercise its rule making authority and redraft Rule 4:1(b)(3). Until then, trial judges are likely to continue to wield great, practically irreversible power in interpreting Rule 4:1(b)(3), thereby determining what materials parties are able to discover prior to trial.

1 See 52 Va. Cir 274 (Charlottesville 2000).
2 Apparently, the defendant did not submit a brief objecting to production. See Id.
3 See Id. at *1.
4 Id.
5 See Law No. 95-335 (Charlottesville 1996).
7 52 Va. Cir 274 (Charlottesville 2000).
8 See 42 Va. Cir. 512 (Rockingham 1997).
9 See Id.
10 Id.
11 See 44 Va. Cir. 315 (Rockingham 1998).
12 Id.
13 See 40 Va. Cir. 228 (Henry 1996).
15 967 F.2d 980 (1992)
16 Id. Rule 26(b)(3) is the federal compliment to Virginia Rule 4:1 (b)(3)
18 Id.
19 35 Va. Cir. 177
20 Id.
21 Id.
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Hypothetical situation is presented on the outside back cover

Analysis

This question involves the unauthorized practice of law issue, but relates to the activity involved rather than to the geographic scope of what everyone would agree is the practice of law.

In assessing the somewhat analogous situation raised by “do-it-yourself” books that enable consumers to create their own corporations, make their own wills and take similar steps, bars and courts have taken varied approaches.

In 1985, the Virginia Bar’s Unauthorized Practice of Law Committee indicated that it is proper for a person not licensed to practice law to prepare form documents such as wills, leases, powers-of-attorney, bills of sale, etc., for sale to the general public. It is, however, improper for a person not licensed to practice in Virginia to give assistance to the general public in the advice concerning the completion of the forms in question. Such activity would constitute the unauthorized practice of law and is prohibited by statute.

UPL Opinion 73 (1/18/85).

Bars and courts in other states have adopted a number of approaches. Some find that “kits” or “manuals” for such activities as preparing wills constitute the practice of law and, therefore, may not be disseminated by non-lawyers. Other courts find the dissemination of such material to be permissible. Some courts hold that providing personalized information in conjunction with such “kits” or “manuals” render the materials and the communications to be the impermissible practice of law.

In Unauthorized Practice of Law Comm. v. Parsons Technology, Inc., No. CIV. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), the court found that the software Quicken Family Lawyer, version 8.0, constituted the unauthorized practice of law. The court explained that the software “is far more than a static form with instructions on how to fill in the blanks.” Id.

*7. Instead, the software “adapts the content of the form to the responses given by the user” and, among other things, “purports to select the appropriate health care document for an individual based upon the state in which she lives.” Id. The Court granted summary judgment for the Texas Bar’s UPL Committee.

The Fifth Circuit reversed the District Court’s ruling after the Texas legislature passed a law excluding such software from the definition of the “practice of law.” Unauthorized Practice of Law Comm. v. Parsons Technology, Inc., 179 F.3d 956 (5th Cir. 1999).

Given this uncertainty, the best answer to this hypothetical is MAYBE.
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**Ethics at a Glance**

**Ethics in the Information Age**

by Thomas E. Spahn

**Hypothetical**

Last Saturday night you spent some time checking interesting websites. You found one site operated by a non-lawyer “consultant” who claims that she can save corporations thousands of dollars in outside lawyer fees. The consultant has created a software program with a “decision tree” that guides subscribers through product liability litigation, and lets the subscriber take such steps as selecting affirmative defenses, challenging venue, etc.

Does this interactive website amount to the unauthorized practice of law by the consultant?

*(Analysis inside on page 22)*