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The Right to Nonsuit in Virginia Litigation

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What is a nonsuit? Simply stated, a nonsuit is a voluntary withdrawal or dismissal of a lawsuit by the party that filed it that allows the party to bring a second suit on the same cause of action. (See **Va. Code § 8.01-380**). It results in a termination of the case "**without prejudice**," leaving open the possibility that the plaintiff will bring the same claims a second time. Litigators from other states are often surprised to hear about this Virginia procedural device, as it arguably gives plaintiffs an enormous tactical advantage. If you're a lawyer admitted *pro hac vice* to a Virginia state court, this blog post is for you.

Plaintiffs in civil litigation get one "free" nonsuit. This means that, subject to the exceptions described below, the first time a plaintiff moves for a nonsuit with respect to a defendant or cause of action, the court must grant it, no questions asked. Plaintiffs do not need to explain their reasons for wanting to nonsuit. Don't like the way a juror looked at you? Go ahead and nonsuit if you feel strongly enough about it. It doesn't even matter **if the case was previously in federal court and voluntarily dismissed**; you're entitled to one nonsuit in Virginia state court. The second time the case is brought, it may still be possible to nonsuit, but this time the judge will have discretion to grant or deny your motion. You can also nonsuit a second time if the defendant has no objection (which is often the case as defendants tend to be eager for litigation to end).

The unconditional right to nonsuit, however, exists only where no defendant has filed a counterclaim, cross-claim, or third-party claim that arises out of the **same transaction** as the plaintiff's claim. If that's the case, the counterclaimant needs to consent to the nonsuit, unless the defendant's claim can remain pending as an

independent action. The counterclaim provisions of the nonsuit statute were designed to address the situation where a plaintiff and defendant are pursuing claims that are two sides of the same coin. For example, in a car accident case, the two sides will often blame each other for causing the accident. If one of those litigants wants the liability issue to be addressed by the court, he or she may be able to prevent the other from taking a nonsuit.

Whether a counterclaim is capable of remaining for independent adjudication depends on whether adjudication of the counterclaim would necessarily involve an adjudication of the plaintiff's claim. See **Gilbreath v. Brewster**, 250 Va. 436, 442 (1995); **Lee Gardens Arlington Limited Partnership v. Arlington County Board**, 250 Va. 534, 541 (1995). A nonsuit will not be permitted where an adjudication of one claim would necessarily result in adjudicating both claims. Derivative third-party claims, for example, cannot be adjudicated independently.

Plaintiffs who have the right to nonsuit can opt to nonsuit their cases at virtually any time, regardless of how much time, effort, and money the parties have spent on the litigation. After a year or two of expensive depositions, discovery, and litigation, if a plaintiff doesn't like the way the trial seems to be going, he can simply declare a nonsuit in the middle of the trial and the entire proceeding will be over (at least until the case is re-filed). In fact, there are only three situations in which a nonsuit will be considered too late: (1) after a "**motion to strike the evidence**" (essentially a motion for judgment as a matter of law or a motion for a directed verdict) has been granted, (2) after the jury "retires from the bar" (i.e., after the jury has been instructed and leaves the courtroom to commence its deliberations), and (3) after the case has been submitted to the judge for a decision, either on the merits of the case or on a dispositive motion. If a nonsuit is taken before any of these things happens, it will be considered timely.

Notice how I said a motion to strike must be ***granted*** before a nonsuit will be deemed too late. If you, as plaintiff, present your entire case to the judge or jury, rest your case, and the defendant makes a motion to strike pointing out a piece of critical evidence you forgot to introduce, it's not too late to nonsuit. Even if you disagree with the defendant's motion, you can sit quietly while the defendant argues his point, and even allow the judge to begin articulating his or her reasoning before you move for a nonsuit. As long as the judge has not actually ruled (and granted the motion), you have the right to nonsuit.

To take or “suffer” a nonsuit is not without consequence: the plaintiff can become liable for the defendant’s court costs and/or attorneys’ fees. There are a couple of situations where this can happen. First, if a plaintiff doesn’t notify the defendant of his intent to nonsuit until the trial is underway or until the week leading up to the trial, courts have the option of ordering the plaintiff to reimburse any costs incurred by the defendant’s witnesses (both lay and expert) in traveling to the courthouse that could have been avoided with a little more advance notice. Second, the court has discretion to award both costs and reasonable attorneys’ fees against the nonsuiting party for any nonsuit taken beyond the first “free” nonsuit.

If you’re trying a case in which there are no counterclaims and you haven’t yet taken advantage of your one free nonsuit, keep it in mind if a key favorable witnesses doesn’t show up, if the court’s evidentiary rulings aren’t going your way, if you suddenly realize you need additional discovery, or any other development arises that suggests a do-over would be in your client’s best interests.

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