

# Virginia



## Nonsense and Nonsuits — The Fairfax Circuit Court Awards Costs and Fees after Plaintiff’s Second Voluntary Nonsuit



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Each legal jurisdiction across the country has its own unique set of procedural rules and potential pitfalls. In Virginia, one of our legal oddities is the “voluntary nonsuit.” As Jessica Relyea of KPM LAW’s Restaurant and Retail Litigation team has previously explained, a nonsuit is a voluntary dismissal, which allows a Plaintiff to correct a flaw in her case and refile in the future. In practice, voluntary nonsuit is a free “do-over.”

In Virginia, every Plaintiff is allowed one nonsuit as a matter of right. This nonsuit may be taken any time before the case has been submitted to the jury. Va. Code Ann. § 8.01-380(B). The Plaintiff does not need the consent of the parties or the approval of the Court to take the first nonsuit. Plaintiffs routinely use nonsuits to avoid summary judgment, fix procedural or strategic errors, defeat the statute of limitations, or short-circuit a trial that appeared to be going poorly for the Plaintiff. The voluntary nonsuit is one of the most potent tactical weapons available to Plaintiffs in Virginia. Nevertheless, it is not all-powerful.

For example, if the Plaintiff wants to take a second nonsuit under Code §8.01-380(B), she must obtain Court approval. And, as Judge Gardiner from the Fairfax Circuit Court recently held, Code § 8.01-380(b) allows the Judge to award court costs and fees against the nonsuiting party for a second nonsuit.

In the recent case of *Lezlie Day v. Gregory Day*, (which was decided on April 1, 2019), the plaintiff, Lezlie Day, filed an action for divorce against her husband, Gregory, in 2003. She subsequently nonsuited that action. In 2018, Lezlie filed a second divorce action, in which she alleged acts that had occurred up until the

2003 suit, as well as acts that had occurred between 2003 and 2018.

Shortly thereafter, Lezlie attempted to nonsuit her second divorce proceeding. She argued that her 2003 divorce proceeding and her 2018 divorce proceedings were two entirely separate lawsuits. As such, she should be entitled to voluntary nonsuits in each.

Judge Gardiner disagreed. He noted that the plain text of Code § 8.01-380(B) provides that “only one nonsuit may be taken to a cause of action or against the same party to a proceeding, as a matter of right.” *Id.* (emphasis added). Judge Gardiner explained that the word “proceeding” in the statute refers to a “type or category of case.” Therefore “[w]here a nonsuit has been granted in a case involving a party to the same type of case as a case in which a subsequent nonsuit is sought, a nonsuit will not be considered a first nonsuit.” Judge Gardiner continued to explain that Gregory was a party to the same type of case (i.e., a divorce proceeding) that had been previously nonsuited. As Lezlie had already nonsuited her divorce proceeding against Gregory once, she had used up her one and only automatic nonsuit.

Ultimately, Judge Gardiner allowed the Plaintiff to take a second nonsuit; however, he also granted the defendant approximately \$45,000.00 in court costs and attorney's fees. The practical impact on this ruling could be greater than the legal impact. Given the harshness of the sanction, a Plaintiff may now consider if it is better to move forward to trial with a defective case rather than risk paying legal fees of the other side. On the other hand, if the Plaintiff is simply giving up on his or her case and does not believe a third filing is likely, he or she may be more inclined to agree to dismiss the case with prejudice instead.

Judge Gardiner's ruling provides one of the few legal decisions in Virginia that has placed limitations on the Plaintiff's right to a voluntary nonsuit. In light of *Day v. Day*, Plaintiffs' Counsel throughout Virginia should think carefully about when and how they decide to take nonsuits. That first nonsuit is free, but the second might cost \$45,000.00.